Lesson 3 – EU Legislative competences and procedures
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V. LEGISLATIVE PROCEDURES

1. We need –first of all!– to understand that the legislative power of the EU is based on a previous power transfer from Member States (Section I). Second, we have to determine in which fields that transfer of legislative power in favor of the EU has occurred (Section II). Third, we draw the limits that the EU must respect when legislating (Section III). Fourth, we pay attention to the ways in which the EU has extended its legislative action more than one would expect (Section IV). Fifth, the most common procedure that the EU employs to legislate (the ordinary legislative procedure) is introduced in Section V.

I. THE INITIAL ASSUMPTION: THE PRINCIPLE OF CONFERRAL

2. The rules governing the legislative action of the EU rely upon a fundamental principle that must be respected always: the principle of conferral. By virtue of the principle of conferral, *competences not conferred upon the Union in the Treaties remain with the Member States*. This is established in article 4.1 TEU. Hence, the EU can only exercise transferred powers. The powers not transferred by Member States to the EU remain with the Member States.

3. The term *competence* refers to a part of social life in which public power intervenes (for instance: health, telecommunications, transports, customs…, etc.), plus the collection of legal power that public entities use to govern those parts of social life. For example, we say that the EU has competence on the customs union, meaning that the EU can dictate legislation to create and manage a customs union embracing the territories of the Member States. You will find that the term competence sometimes designates the fields on which an entity has power, and sometimes designates the legal powers over a specific field. For example, we say that the customs union is a competence of the EU, or that the EU has legislative competence over the customs union. Texts use these two meanings of competence interchangeably.

4. The principle of conferral implies that, unlike the Member States, the EU cannot legislate every aspect it wishes. The EU does not enjoy the power to define its own legislative powers or competences. Therefore, the EU does not have what constitutional law scholarship designates *Kompetenz–Kompetenz* (the competence to define its own competences). The EU holds the legislative powers transferred to it by Member States in the founding Treaties.

5. The principle of conferral affects *every exercise of public power of the EU*. It affects the legislative action of the Union, and it also affects its executive and judicial action. The principle of conferral affects the activity of all EU institutions.

6. The principle of conferral is characteristic of the EU framework and it differentiates it from the constitutional architecture of Member States.

II. FIELDS OF THE LEGISLATIVE ACTION OF THE EU (EU LEGISLATIVE COMPETENCES)

In which fields can the EU legislate? The answer is not straightforward.

7. Part of the answer is in the articles of the TFEU referring to the policies of the Union. One could scan all of them and come with a list of fields in which the EU legislates.

8. However, this is not enough. Besides the competences expressly acknowledged in the TFEU, there are four additional mechanisms that the EU uses to *extend* its competences beyond *the letter of the TFEU*. These mechanisms are: (i) the internal market competence of article 114 TFEU, (ii) the residual competence of article 352 TFEU, (iii) the judicial doctrine of teleological interpretation, and (iv) the judicial doctrine of implied powers. We shall explain them.

1. A list of EU competences

9. In EU law there is not a list enumerating all EU competences. Rather, the legislative competences of the EU are spread in the 172 articles (articles 26-197) of the 24 Titles of Part III of the TFEU (Part III is named Union Policies and Internal Actions).

10. Each Title refers to a specific field of action and in each Title there are several articles that describe the scope of the field and declare which powers the EU has to act in those fields.

11. Please read article 169 TFEU:

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PART THREE

UNION POLICIES AND INTERNAL ACTIONS

Article 169

(ex Article 153 TEC)

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:

(a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;

(b) measures which support, supplement and monitor the policy pursued by the Member States.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).

Though not literally, article 169.1 above states that the Union has the competence to contribute to the protection of health, safe and economic interests of consumers, as well as to promote their rights. This first paragraph of article 169 sets the material field of this competence that we may name "consumer protection".

12. In sections .2 and .3 of article 169, the TFEU refers to the powers that the EU shall exercise to pursue the aims of this competence on "consumer protection". Section .2 is referring to measures adopted following article 114 TFEU and measures supplementing Member State action. These measures are to be translated into legislative proposals to be passed according to the ordinary legislative procedure (section .3). Later in these notes, article 114 measures are explained, as well as the ordinary legislative procedure. You may not know what they are, but that is not that important now.

13. Important now is that you understand how article 169 defines the competence of the EU: (i) first the field "consumer protection" is recognized as a field of EU competence in section .1, and then (ii) sections .2 and .3 specify the legal powers conferred to the Union to take care of consumer protection. The powers of the EU are to adopt legislative measures of article 114 TFEU and legislative measures in support of Member States action.

14. This pattern of first defining the material field and second defining the legal powers conferred repeats in the 24 Titles of Part III of the TFEU. These Titles confer the EU the following competences:

    - Internal market (Title I, Title II, Title IV TFEU)
    - Agriculture and Fisheries (Title III TFEU)
    - Area of Freedoms, Security, and Justice (Title V TFEU)
    - Transport (Title VI TFEU)
    - Competition, Taxation (Title VII TFEU)
    - Economic and Monetary Policy (Title VIII TFEU)
    - Employment (Title IX TFEU)
    - Social Policy (Title X TFEU)
    - The European Social Fund (Title XI TFEU)
    - Education, Vocational Training, Youth and Sport (Title XII TFEU)
    - Culture (Title XIII TFEU)
    - Public Health (Title XIV TFEU)
    - Consumer Protection (Title XV TFEU)
    - Trans European Networks (Title XVI TFEU)
    - Industry (Title XVII TFEU)
    - Economic, Social and Territorial Cohesion (Title XVIII TFEU)
    - Research and Technological Development and Space (Title XIX TFEU)
    - Energy (Title XXI TFEU)
    - Tourism (Title XXII TFEU)
    - Civil Protection (Title XXIII TFEU)
    - Administrative Cooperation (Title XXIV TFEU)

2. Types of competences

15. A question immediately arises: *Is the Union the sole responsible in these fields or does it share its responsibility with Member States?* The answer is that the Union somehow shares its responsibility with Member States. At least in some competences.

16. Because the EU is of a federal structure, the different territorial levels of government in the EU share responsibilities and powers in different fields. They do so in different degrees depending on the specific field.

    If this is the case, then, how is responsibility shared between the EU and Member States in the fields we listed?

17. There are different responsibility-sharing criteria or rules for the different fields of competence. Hence, we refer to different types of competences: (i) exclusive, (ii) shared, (iii) coordinating, and (iv) complementary.

2.1 Exclusive competences

18. In exclusive competences, the EU is the *sole responsible for the field*. The EU is *the only entity* to decide. More specifically, the EU determines who is going to legislate in the field.

19. The EU may decide that only the EU legislator (European Parliament plus the Council) is going to legislate in the field. Perhaps the EU decides that it is going to legislate on the main aspects while Member States are going to adopt rules to implement EU legislation. If the EU opts for this second option, the EU will define the extent and detail of the activity allowed to Member States.

20. Article 2.1 TFEU defines what exclusive competences are and article 3 TFEU lists them. According to the latter, the Union has exclusive competence only in the following areas: (i) customs union, (ii) competition rules for the internal market, (iii) monetary policy for Member States whose currency is the euro, (iv) conservation of marine biological resources, and (v) the EU's common commercial policy.

2.2 Shared competences

21. In shared competences, *not just the EU, but both the EU and Member States are responsible for the competence.*

22. Shared competences are defined in article 2.2 TFEU and are listed in article 4 TFEU. According to the latter, shared competences are (i) internal market, (ii) social policy, (iii) economic, social and territorial cohesion, (iv) agriculture and fisheries excluding the conservation of marine biological resources, (v) environment, (vi) consumer protection, (vii) transport, (viii) trans-European networks, (ix) energy, (x) area of freedom, security and justice, and (xi) common safety concerns in public health matters.

23. Shared competences are the most frequent ones. They are the *default type of competence of the EU*.

24. The difficulty in shared competences is to explain *how the EU and Member States distribute their responsibility in the competence*. The question is *who must do what and according to which rule of distribution?*

25. In some cases, responsibility in a shared competence is distributed on the basis of *EU preemption*. Preemption means that the EU chooses certain aspects or sub-fields of the shared competence in which it is going to act alone and excludes the action of Member States in those specific sub-fields of the shared competence. Member States are allowed to act in the rest of the sub-fields of the shared competence. An example of preemption is in the field of border checks, asylum, and immigration, which is part of the shared competence "freedom, security and justice". In this specific field, the EU decided to draft alone the multi-annual strategic policy planning of border management, thereby excluding Member State action in this regard (please check recital 15 and article 8 of the Frontex Regulation[1]).

26. In other cases, responsibility in a shared competence is distributed between the EU and Member States on the basis of *overlapping*: In this case, both the EU and Member States act in the same field. For example, in the field of border checks, asylum, and immigration (included in the shared competence "freedom, security and justice"), the action of returning people in border management is handled *jointly* by the EU and Member States (please check recital 17 and articles 7.3, 7.4 of the Frontex Regulation[2]).

27. In other cases, responsibility in a shared competence is distributed between the EU and Member States on the basis of a *set of minimum standards that the EU establishes allowing Member States to improve those minimum standards*. This has traditionally happened in the field of environment. For example, article 193 TFEU foresees that "The protective measures adopted pursuant to article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures (…)". Article 193 TFEU is allowing Member States to adopt further protective measures to the ones introduced by the EU. In this case, the EU acts in the field setting a minimum protection level that Member States may reinforce with their own national measures.

28. Please bear in mind that article 2.2 TFEU refers *just to preemption* when it defines what a shared competence is. Despite this fact, historically and today, responsibility between the EU and Member States in shared competences *is distributed following not one but the three criteria explained above*.

2.3 Coordinating competences

29. Coordinating competences refer to the power that article 5 TFEU grants the EU to coordinate the economic, employment, and social policies of Member States.

30. The scope of this power of the EU is much smaller than that granted to the EU by exclusive and shared competences.

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1 Regulation (EU) 2019/1896.

2 *Ibid.*

31. One example of this coordinating power is the procedure of article 121 TFEU. In this procedure, the Council with the assistance of the Commission issues broad guidelines for the economic policies of Member States and monitors the economic developments of the Member States in light of these guidelines so that the economic performance of all Member States converges.

2.4 Complementary competences

32. Complementary competences refer to the power of the EU to *support*, *coordinate* or *supplement* the action of Member States in certain fields. Those fields are the ones of article 6 TFEU: (i) protection and improvement of human health, (ii) industry, (iii) culture, (iv) tourism, (v) education, vocational training, youth and sport, (vi) civil protection, and (vii) administrative cooperation.

33. As in the case of coordinating competences, the scope of the complementary competences is more reduced than that of exclusive and shared competences.

34. One example of complementary competence is the one that enabled the EU to create the Health Security Committee assisting the Commission with the COVID-19 crisis. According to the legislative act that created this committee[3], the EU acted based on the competence of article 168 TFEU ("protection of consumers' health"). The decision states that Union action is to *complement* national policies and that the Decision aims to *support* cooperation and coordination between the Member States (article 1.2). The text of the Decision reflects that the competence of the Union in the protection of human health is complementary.

III. LIMITATIONS TO THE LEGISLATIVE ACTION OF THE EU (PRINCIPLES OF PROPORTIONALITY AND SUBSIDIARITY)

35. The EU is subject to limitations when it exercises its legislative policies. The fact that the EU has legislative competence over a field does not mean that the EU can issue legislation unconstrained. In fact, when the EU exercises its legislative competences it is limited by two principles: the principle of proportionality and the principle of subsidiarity.

36. These two principles apply to the legislative action of the EU, but they also apply to its executive action. The activity of issuing legislation and the activity of implementing legislation have to comply with the principles of proportionality and subsidiarity.

1. The principle of proportionality

37. Article 5.4 TEU establishes that "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties".

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3 Decision 1082/2013/EU.

38. In broad terms, the principle of proportionality establishes the obligation of public powers *to adjust the means to the goal they are pursuing*. In the legislative action of the EU, proportionality means that the EU has to adjust its legislation to the goals set in the Treaties.

39. The principle of proportionality in EU law is linked to the principle of proportionality elaborated in post-WWII German public law. Nevertheless, the principle of proportionality is not an invention of post-WWII German public law. Traces of the principle of proportionality are found in XIXth century Prussian administrative law and in the teachings of medieval jurists worried with the rules for conducting war (SUÁREZ, AQUINAS, GROTIUS).

40. Furthermore, the idea of the principle of proportionality is connected to the idea of distributive justice of ARISTOTLE. Distributive justice demands that a rule must be applied differently to addressees of the rule that find themselves in different circumstances. Treatment to those that find themselves in different circumstances should be differentiated *in proportion* to the extent of that difference of circumstances.

41. In order to find whether a measure is proportional, judges run a three-step test. A measure that respects proportionality has to be all of the following three: (i) *suitable*; the measure has to be *appropriate* to satisfy the goal it pursues; (ii) *necessary*. From the list of different suitable measures, the necessary one is the least restrictive of all for citizens; (iii) *proportional*, there has to exist a fair balance between the benefits for the public interest and the burdens that the measure causes. The benefits of the measure must outweigh the burdens.

2. The principle of subsidiarity

42. The second limit to the exercise of EU legislative action is the principle of subsidiarity. This principle was considered to be very original when it was included for the first time by the Maastricht Treaty. What is special about the principle of subsidiarity is that it is an alternative criterion for distributing public power in society. Subsidiarity is, perhaps, the strongest alternative to the notion of sovereignty we know of. Academic writing confirms so.

43. When we refer to subsidiarity we are really referring to different concepts. The expression "principle of subsidiarity" has different meanings. The principle of subsidiarity can refer, (i) to the social ethics principle known as the principle of subsidiarity, or (ii) to one of the two versions of the principle of subsidiarity existing in EU law (legal versions of the principle of subsidiarity). The two EU law versions of subsidiarity are: (i) a general principle of subsidiarity, and (ii) the subsidiarity rule of article 5.3 TEU and Protocol 2 to the Treaties.

2.1 The social ethics principle of subsidiarity

44. In this version, subsidiarity is a principle prescribing that the higher social entities shall assist the lower only in those tasks that the lower ones cannot carry out on their own. For example, the central government of a country should abstain from carrying out tasks that the regional governments of the country can. The central government shall

only intervene if those regional governments require assistance. Another example: a regional government should avoid providing services to citizens that local municipalities can provide. The regional government shall do so only if municipalities cannot do it by themselves. This implies a negative duty and a positive duty for higher political entities. The negative one is that they shall abstain from intervening in the affairs of lower entities if they are able to carry out their own functions. The positive one is the duty of higher entities to assist lower ones in case they are not able to carry out their own functions.

45. There is an impressive amount of literature trying to find the origin of the idea of subsidiarity. According to this literature, the number of authors considered to be the "father of subsidiarity" is high. It has been argued that the first idea of subsidiarity is in the Book of Exodus, in the writings of ARISTOTLE, AQUINAS, LINCOLN, STUART MILL, TOCQUEVILLE… It is very common to consider the XVIIth century jurist and politician JOHANNES ALTHUSIUS as the father of subsidiarity, despite the fact that he did not use the word "subsidiarity" in his writings. The problem with this last contention is that the social organization that ALTHUSIUS proposed in his writings (an *organic* society) was not essentially different from that proposed by other medieval scholars. In fact, the writings of other medieval scholars were already connected to the idea of subsidiarity in a similar fashion to those of ALTHUSIUS.

46. The first express formulation of the principle of subsidiarity is in paragraph 79 of the 1931 encyclical *Quadragesimmo Anno*. In 1931 this document formulated the principle of subsidiarity as a limit to the action of the fascist and Stalinist States. The aim was to defend human freedom from a type of State that tended to cancel it.

47. The social ethics principle of subsidiarity jumped into the European political debate in the 1970s. In 1971 the idea of subsidiarity was shared with the wide public in an article written by Commissioner RALF DAHRENDORF. Mr. DAHRENDORF, trained in sociology and philosophy, demanded publicly that the Commission started adopting a less centralizing approach and began acting according to subsidiarity. In 1976, subsidiarity appeared in the plank of the European People's Party.

48. In 1986, the Single European Act referred to subsidiarity in the field of environment. In 1992, subsidiarity was introduced in the Treaty on European Union signed in Maastricht. One of the reasons for incorporating subsidiarity was that it was acceptable for a wide range of parties intervening in the negotiations preceding the treaty. For instance, the UK negotiators were happy to incorporate subsidiarity because it would prevent the EU from assuming powers of Member States. At the same time, some strong European regions like Bavaria were happy to accept the principle of subsidiarity because it would protect the powers of their regions from encroachment by their mother Member States.

2.2 The EU law general principle of subsidiarity

49. The social ethics principle of subsidiarity was somehow incorporated into EU constitutional law through the so-called general principle of subsidiarity of EU law. *According to the EU law general principle of subsidiarity, political power should be exercised as closely as possible to citizens: the EU shall abstain from acting if Member States can do so satisfactorily*.

50. This general principle of subsidiarity applies to the legislative actions of the EU, but also to the executive action of the EU.

51. The general principle of subsidiarity is scattered in EU law in different legal texts. An example is the preamble of the TEU: "(…) Resolved to continue the process of creating an ever closer union among the peoples of Europe, *in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity* (…)".

52. Other examples can be found in many other legislative acts of the EU. For instance, recital 22 of the Frontex Regulation[4] mentions the general principle of subsidiarity when it states that, "The Agency [in reference to Frontex] should carry out its tasks *in accordance with the principle of subsidiarity and without prejudice to the responsibilities of the Member States* (…)".

2.3 The subsidiarity of article 5.3 TEU

53. According to article 5.3 TEU,

> *Article 5*
> (ex Article 5 TEC)
>
> 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

54. Of all the versions of the principle of subsidiarity, this is the most specific one. When you carefully read article 5.3 TEU you can notice that it *only affects legislative action of the EU referring to non-exclusive competences* ("…in areas which do not fall within its exclusive competence…"). Please compare this to the fact that the general principle of subsidiarity refers to all legislative and executive actions.

55. Article 5.3 TEU allows legislative action in non-exclusive competences only if the following two conditions are met: (i) that the objectives of a proposed action cannot be sufficiently achieved by Member States (the *insufficiency* test), and that (ii) the action of the Union can better achieve those objectives (the *comparative advantage* test). In principle, only if both conditions are satisfied can the EU legislate in the field.

56. Since the principle of subsidiarity of article 5.3 TEU was introduced, scholars underline that for judges it is very difficult to control compliance with it. Why? Because in the eyes of a judge, ruling whether a piece of legislation respects article 5.3 is more a political decision than a legal one.

57. The behavior of the CJEU confirmed the prediction of scholars. The Court has been very precautious when it comes to article 5.3 TEU and has avoided overturning

[4] Regulation (EU) 2019/1896.

legislation. In fact, as of today, there is no CJEU sentence that has declared void an EU legislative act on subsidiarity grounds.

58. Due to this situation, progressively the enforcement of subsidiarity has focused more on the procedure to adopt legislative acts. *Today's control over subsidiarity is more procedural than substantial*. Even though the CJEU still has the power to enforce the subsidiarity of article 5.3, there are *new procedural* means to protect subsidiarity. Which ones?

59. The first one is the obligation that the EU legislator has to justify the need to issue a legislative act in terms of subsidiarity by way of providing a detailed statement in the preamble of the act. Please read the following recital 120 of the Frontex Regulation[5]:

> (120) Since the objectives of this Regulation, namely the development and implementation of a system of integrated management of the external borders to ensure the proper functioning of the Schengen area, cannot be sufficiently achieved by the Member States acting in an uncoordinated manner but can rather, by reason of the absence of controls at internal borders, the significant migratory challenges at the external borders, the need to monitor efficiently the crossing of those borders, and the need to contribute to a high level of internal security within the Union, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

The obligation to include a statement like this one in every piece of legislation is established in article 5 of Protocol 2 to the Treaties on the application of the principles of subsidiarity and proportionality.

60. The second mechanism to protect subsidiarity procedurally is the *chance* that national parliaments of Member States have to express their opinion on the compliance with subsidiarity of EU legislative acts. The reasoning behind this procedure is the following one: when applying subsidiarity, a political decision is taken because declaring whether the EU should adopt or refuse to adopt a legislative act is a political choice. In this political decision, national parliaments should have a say because it is their powers that are at stake when the EU adopts such a decision.

61. Based on this reasoning, Protocol 2 to the Treaties establishes a yellow card mechanism and an orange card mechanism.

62. In the *yellow* card mechanism[6]: (i) *draft* legislative acts are sent to national parliaments; (ii) national parliaments have 8 weeks to send back a reasoned opinion arguing why the draft does not comply with the principle of subsidiarity; (iii) national parliaments have two votes each (a total of 54 votes in the Union); (iv) if the votes backing negative reasoned opinions represent at least a third of all the votes (at least 18 votes), then the Commission[7] shall review the draft and decide to withdraw or maintain the draft; (v) if

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5 Regulation (EU) 2019/1896.

6 Articles 6 and 7.2 of Protocol 2.

7 It may be the case that another institution may be responsible for the draft of the legislative act. In such a case it would be that institution the one deciding whether it withdraws or maintains the draft. In the majority of cases it is going to be the Commission and it is for that reason that we simplify and say that the Commission will withdraw or maintain the draft of the legislative act.

the Commission decides to maintain the draft, it shall justify its decision. The yellow card mechanism does not have further consequences.

63. By virtue of the *orange* card mechanism[8]: (i) *draft legislative acts adopted according to the ordinary legislative procedure* are sent to national parliaments; (ii) national parliaments have 8 weeks to send back a reasoned opinion arguing why the draft does not comply with the principle of subsidiarity; (iii) national parliaments have two votes each (a total of 54 votes in the Union); (iv) if the votes backing negative reasoned opinions represent at least a *simple majority* of all the votes (at least 28 votes), then the Commission shall review the draft and decide to withdraw or maintain the draft; (v) if the Commission decides to maintain the draft, it shall justify its decision; (vi) the justification of the decision of the Commission to maintain the draft will be sent to the EU legislator (European Parliament and Council) so that the latter considers *during the first reading of the ordinary legislative procedure* whether the draft respects or not subsidiarity; (vii) if the Council by a majority representing at least 55% of its Members (15 votes), or the Parliament by a majority of votes cast considers that the draft does not respect subsidiarity, then the draft will be withdrawn.

IV. COMPETENCE EXTENSION MECHANISMS

64. The mechanisms that the EU has used to expand its legislative competences have to be considered. Two of them are based on the TFEU, and the other two on the doctrine of the CJEU. The first two are, (i) the internal market competence of article 114 TFEU, and (ii) the residual competence of article 352 TFEU. The second two are, (i) teleological interpretation, and (ii) the doctrine of implied powers.

1. The internal market competence (article 114 TFEU)

65. Article 114 TFEU is considered to be *the broadest competence of all the Treaties*. It enables the EU to, "(…) adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market".

66. Article 114 TFEU is a competence that the EU invokes to adopt legal acts that eliminate disparities that exist between the legislations of Member States that hinder the internal market.

67. When establishing an internal market *by adopting common rules that impose common standards that harmonize, or reduce the differences that exist between different national legislations* we refer to *positive integration*. Positive integration entails the harmonization or approximation of national laws, i.e. the alignment of their content. Article 114 is a mechanism of positive integration.

68. The alternative to positive integration is *negative integration*. Negative integration consists of creating a common market *by recognizing that all the different national rules on goods of the different members of the market are equally valid and should be admitted by the rest of members, despite being different*. For instance, following a negative integration approach, goods that can be legally sold in Portugal because they respect Portuguese law can be legally sold in the

8 Articles 6 and 7.3 of Protocol 2.

rest of Member States of the internal market, regardless of the fact that those goods only comply with Portuguese standards and regulations.

69. In negative integration, there is no need for a common European regulation setting common standards. Negative integration was introduced by the CJEU; the case of *Cassis de Dijon*[9] is of key importance here.

    The EU has built the internal market through negative and positive integration. Let us consider positive integration and article 114 TFEU.

70. The problem with article 114 TFEU is a problem of limits. Can the EU invoke article 114 TFEU to adopt *any* measure that advances the common market? No, article 114 TFEU does not grant the Union unlimited power to regulate the internal market.

71. Through its case law, the CJEU explained that article 114 TFEU only justifies the adoption of legislative action that eliminates disparities in national laws as a means to *attain the establishing and functioning of the internal market*. The disparities that the measures adopted under article 114 TFEU intend to eliminate should be disparities that, (i) give rise to obstacles in trade, or (ii) lead to appreciable distortions in competition.

72. The CJEU has declared that the disparities that justify using article 114 can also be *potential* or *future* disparities, but those potential disparities have to be *likely to occur* and not merely hypothetical.

73. Despite the limitations that the CJEU has set, the accusation still exists that article 114 grants the EU unlimited competence over the internal market. Just in one case, the CJEU declared that the Union misused article 114 TFEU: case *Germany v. Parliament and Council*[10], the so-called Tobacco Advertising Judgment. In this case, the Union introduced a ban on tobacco advertising that the CJEU considered went beyond what article 114 TFEU allows because the ban did not promote the trade of goods in the market. The ban *only prohibited* certain ways of tobacco advertising and did not promote trade at all.

74. However, in other cases the CJEU has adopted a different criterion and accepted using article 114 TFEU to justify measures that are difficult to consider as measures advancing the internal market. For instance, in the case *Philip Morris and others*[11] the CJEU admitted as valid the prohibition to place tobacco products with menthol flavor.

2. The residual competence (article 352 TFEU)

75. Article 352 foresees an additional mechanism that the EU uses to extend its competences. It establishes that if action by the Union should prove necessary to attain one of the objectives set in the Treaties, and the Treaties have not provided the necessary powers, appropriate measures can be adopted by the EU.

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9 Reference 120/78.

10 Reference C-376/98.

11 Reference C-547/14.

76. Article 352 TFEU is similar to the US Constitution "Necessary and Proper Clause", by virtue of which the American Union (the Federation) has the power to make all laws necessary and proper for carrying into execution all the powers vested in the Constitution.

77. Article 352 TFEU allows the EU, (i) to adopt legislative measures in fields where the Union already has competence and (ii) even in fields with no specific title in the Treaties. An example of the first case is the decision of the EU to create through a legislative decision a social summit gathering twice a year the European Council, the Council, the Commission, and social partners[12]. Although the power to create the summit is not recognized in any of the articles of the Title X on Social Policy of the TFEU, article 352 grants the EU the power to create such summit on the grounds that it is a measure that contributes to attaining the goal of article 3.3 TEU (working for a highly competitive social market economy). An example of the second case is the development of an environmental policy by the EU before the Treaties even mentioned the environment.

78. The use of article 352 is subject to conditions:

- Article 352 TFEU cannot entail that the EU adopts harmonization rules in fields in which the Treaties exclude harmonization (for instance in complementary competences the EU cannot invoke article 352 TFEU to adopt harmonization rules).
- The EU cannot invoke article 352 TFEU to pursue the objectives of the EU's Common Foreign and Security Policy.
- The power of article 352 TFEU cannot be used to introduce a qualitative modification of the competences of the EU (please see Opinion 2/94 of the CJEU).
- The measures adopted according to article 352 TFEU require unanimity in the Council.

3. Teleological interpretation

79. The competences of the EU are established by legal rules that must be interpreted in order to be applied. Depending on how these rules on the competences of the EU are interpreted, these competences will be wider or narrower.

80. Legal rules can be interpreted according, (i) to the literal meaning of their text (literal or grammatical interpretation), (ii) to their original meaning as shown by its history (historical interpretation), (iii) to their place and function it has within the rest of the legal system (systematic interpretation), or to (iv) their purpose (teleological interpretation).

81. The CJEU has used teleological interpretation to interpret the competences of the EU. In these cases, the Court analyzes the purpose underlying the textual rule.

12 Council Decision (EU) 2016/1859.

82. A paradigmatic example of teleological interpretation is the case *Casagrande*[13]. In essence, the question was whether article 12 of Regulation (EEC) 1612/68 guaranteed that Member States provided the children of workers coming from another Member State the right to financial grants that children of the receiving member State had. Article 12 read as follows:

> *Article 12*
>
> The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

83. One could argue that according to a literal interpretation of article 12, Member States had the obligation to "admit" children from nationals of Member States to education, *but not to aid them financially in the way they do with their nationals*.

84. Nevertheless, the Court of Justice understood that when article 12 provides that the children of workers coming from other Member States shall be admitted "under the same conditions as the nationals", article 12 is also ordering that these children are provided the same financial aid for the schooling of nationals.

85. Based on which argument did the Court of Justice decide to extend the letter of article 12? The Court argued that *the purpose* of article 12 was to integrate workers coming from other Member States by way of removing obstacles to the mobility of workers, in particular those that prevent the integration of workers in host countries. The Court understood that article 12 was referring not strictly to "admittance conditions to the educational system" but also to the circumstances affecting admittance, including school grants (paragraphs 6-9 of *Casagrande*).

4. The doctrine of implied powers

86. The CJEU has extended the powers of the EU based on a constitutional doctrine with origin in the US: the doctrine of implied powers.

87. The doctrine of implied powers is not focused on finding the purpose that inspires the rule that establishes a competence. Rather, it is focused on finding powers (competences) *not expressly declared but that are implied necessarily from the powers expressly declared*. In these cases, the argument is that logic demands that certain non-expressly-recognized powers are part of the powers that have been expressly recognized by the constitutional text.

88. This reasoning goes back to an old rule of common law: when the law bestows something upon anyone, it is deemed to bestow also that without which the thing cannot be (Reports of Sir Edward Coke): *Quando lex aliquid alicui concedit conceditur et id sine quo res ipsa esse non potest*.

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13 Reference 9/74.

89. A statement of JAMES MADISON in the Federalist number 44 repeats the same idea: *No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized.*

90. For example, if someone is granted expressly the power to act as a teacher, it is implied that that person receives several powers, including, for instance, the implied power to deny access to someone arriving late to class. Though not expressly recognized anywhere, logic dictates that a teacher must necessarily have the power to maintain order and discipline in the class. This power to deny access is an implied power that goes with the main powers that are expressly granted to a teacher.

91. Case *FEDECHAR*[14] is an example. On that occasion, the Court of Justice declared that the Commission had the power to establish the price of coal in the common market, despite the fact that such a power had not been expressly transferred to the Commission. The argument of the Court was that the Commission had been expressly given the power to establish a coal compensation mechanism between Member States. The power to create that mechanism *implied necessarily that the Commission could set a coal price because otherwise, the mechanism could not work.*

92. The CJEU has used the implied powers doctrine seldom. Apart from *FEDECHAR*, other examples are the case *Italian Republic v. the High Authority*[15], and the case *Commission v. the Council*[16].

14 Reference 8/55.

15 Reference 20/59.

16 Reference 22/70.

V. LEGISLATIVE PROCEDURES

93. This section is not elaborated on in these notes. Please refer to pages 247-254 of our text-book. Please make sure,

- that you understand the difference between the ordinary legislative procedure and special legislative procedures.

    - In the ordinary legislative procedure, the European Parliament and the Council act jointly on an equal footing. No institution dominates the procedure. Both are co-legislators. It was named *ordinary* because it is the procedure used to adopt most of the legislative acts of the EU.

    - In the special legislative procedures, one institution dominates the procedure.

        - In the first type of special legislative procedure, the European Parliament is the main actor and the Council participates only with its consent. This is the procedure to adopt the statute of the Ombudsman (article 228.4 TFEU).

        - In the second type of special legislative procedure, the Council is the deciding institution and the European Parliament participates with its consent. This is the procedure to follow to adopt the regulation establishing how the Union raises its own economic resources (article 311 TFEU).

        - In the third type of special legislative procedure, the Council is the institution deciding and the European Parliament participates with its opinion. This is the procedure to adopt harmonization measures referring to taxes (article 113 TFEU).

Please make sure that you understand in detail all the phases of the ordinary legislative procedure.

LESSON 4 – SOURCES OF EU LAW AND ITS RELATIONSHIP WITH NATIONAL LAW

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I. SOURCES OF EU LAW

1. Introduction

What are *legal sources* or *sources*?

1. They are the constitutionally-recognized different *origins* of law. For instance, one source of law in a country is statute[1] or written law (in Spanish, *la ley*). Customary law and case-law are two other examples of legal sources. A comparison is useful here. Try to imagine each legal source as each one of the various streams of a fountain. Just as water springs through the different streams of one sole fountain, so does law flow through different legal sources.

2. Why are legal sources relevant? Why should we differentiate them? Because each source has a different impact on natural persons[2], legal persons[3], and Member States. When one dominates the different types of legal sources, one grasps faster the different effects that law has on its addressees and the available options they have to protect their interests.

3. The word "source" comprises all the potential manifestations of that source. For instance, when we speak of statute law as a legal source in a certain country, we are referring to all the statutes in force in that country. When we speak of case-law as a legal source of a certain country, we are referring to all the judgments delivered in that country. When we speak of treaty law as a source of international law, we are referring to all international treaties.

4. Legal sources consist of different legal acts or acts. For example, regulations are a legal source of EU law that consists of a large plurality of specific regulations, each of which is a legal act. We say that the regulation on data protection adopted in 2016 is a legal act or, simpler, an act. This data protection regulation is one specific manifestation of the legal source regulations. The terms legal source and legal act are used interchangeably.

5. At the end of this Section I you will find a diagram depicting EU legal sources. There are two main types of legal sources in that diagram: *primary law* and *secondary law*. *International treaties* and *supplementary law* are additional legal sources.

6. Primary law is foundational EU law. It includes the treaties creating the EU (TEU, the TFEU, and the EURATOM treaty); the older versions of the foundational treaties and the foundational treaties that were abolished (for instance, the Treaty establishing the ECSC); other treaties that affect the basic structure of the EU (for instance, the Merger Treaty); the Charter of Fundamental Rights of the EU, and; general principles of EU law, contained in the judgments of the Court of Justice of the EU and in the Treaties (for instance, the principle of legal certainty). Doubts exist on whether the treaties of

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1 The word statute stands for a law that is formally written down and passed by a parliament or another body with the power to do so.

2 Natural persons are human beings. Some legal systems do not grant the condition of natural person to human beings in their earliest phases of life and this is the object of strong controversy.

3 Legal persons are groups of natural persons and abstract entities that are deemed to have many of the rights and obligations of natural persons (for example a corporation like Google, or an association like the International Law Students Association).

accession are primary law (an example of an accession treaty is the one signed between the European Communities and the Kingdom of Spain on 12 June 1985).

7. Secondary law *develops and implements primary law* and is in a lower position hierarchically. It comprises the legal acts listed and defined in article 288 of the TFEU (these are the so-called *typical acts*), as well as other legal acts that are not defined by the TFEU (these are the so-called *atypical acts*). The list of atypical acts is a large list of different acts that are still waiting for proper classification. As of today, we do not have a complete classification of every type of legal act of the EU.

8. After years of confusion, the Treaty of Lisbon incorporated into the TFEU a *catalog of the typical acts of secondary law*. *That catalog is in article 288 TFEU*. You should master the content of this article. The five items of the list are *regulations, directives, decisions, recommendations, and opinions*.

9. Regulations, directives, and decisions are *binding*. Recommendations and opinions are *non-binding*. Recommendations suggest a course of action but do not oblige in legal terms. Opinions convey the point of view of an EU institution on a certain issue but do not oblige in legal terms.

10. The binding acts of article 288 TFEU (regulations, directives, and decisions) can be adopted *following a legislative procedure*, or they can be adopted *following a non-legislative procedure*. Article 289.3 TFEU establishes that the former are *legislative acts*, while the latter are *non-legislative acts*.

11. As of the Treaty of Lisbon, generally, non-legislative regulations, directives, and decisions are either *delegated* or *implementing*. Lesson 5 elaborates on what delegated and implementing acts are.

12. The list of article 288 TFEU *is a particularity of EU law*. The system of sources that this list constitutes is quite different from national systems of legal sources. The EU system is different because of, (i) the particularity of some of its sources, especially directives, and (ii) the fact that there exists no hierarchy between EU secondary sources.

13. EU supplementary law complements the rest of the legal sources. It includes the case-law from the CJEU, international public law, general principles of law[4], and the teachings of academic legal doctrine.

[4] Please note that in EU law, general principles of EU law are primary law, while general principles of law are supplementary law.

2. Sources of EU secondary law

Sources of EU secondary law are important because they are the ordinary means through which the EU acts. You should be very familiar with them.

2.1 Regulations

14. Article 288 TFEU establishes that "(...) A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States (...)".

15. In principle, regulations are of general application.

16. "General application" indicates that regulations are enacted for a group of addressees defined according to an *abstract criterion*. For example, a regulation will be addressed to "the higher education institutions of the European Higher Education Area" (in this case the addressee is defined in abstract), and not to "Universidad de Navarra" (in this second case the addressee is defined nominally).

17. General application also indicates that regulations are applied to situations defined according to an abstract criterion. For example, a regulation will punish cases of illegal tax aid provided by countries to selected companies (in this case the situation is defined in abstract), and not only the specific occasion in which Ireland provided tax aid amounting to 13 million € to Apple (in this second case the object of the regulation is just a specific event and not a situation defined in abstract).

18. Regulations are binding in their entirety and are *directly applicable in all Member States*. What is *directly applicable*? It alludes to the relationship between regulations and the national laws of Member States. Direct applicability is explained later in Section II 2 of this lesson.

19. Regulations are the equivalent to a national law. In fact, regulations were named European laws by the failed Treaty Establishing a Constitution for Europe. After the decision was taken to avoid constitutional language in the Treaty of Lisbon, the term law was repudiated and the historical term regulation was kept. The concept of regulation can be traced back to the Treaty Establishing the European Economic Community.

2.2 Directives

20. Directives are addressed to Member States (*not to legal, nor natural persons*) and are binding as to the result to be achieved. Directives are the most special of the sources of EU law, but they are not an invention of EU law; they already existed in international law.

21. Directives are considered to be, in principle, more respectful of the autonomy of Member States than regulations *because they leave States to choose the means through which they attain the results that the directive demands*. It is up to Member States to decide how they are going to implement a directive addressed to them.

22. If we compare the percentage of adopted regulations with the percentage of adopted directives we will notice that the EU legislator uses more regulations than directives.

This poses a problem. The principle of proportionality of article 5.4 TEU demands that the *form* of the action of the EU shall not exceed what is necessary to achieve the objectives of the Treaties. It may be considered that the Union is going too far by issuing more regulations than directives. Could not the Union *be less aggressive* by way of issuing more directives and fewer regulations?

23. Some scholars understand that the EU does not respect the principle of proportionality because of this reason. For them, directives should be used more frequently. Some others understand that, actually, directives can be more aggressive with national law than what their definition suggests because a directive can be very strict with Member States. This second group is not so concerned with the comparatively high percentage of regulations approved by the EU.

2.3 Decisions

24. Decisions are binding in their entirety. *They are not of general application*. In principle, decisions are for an addressee nominally identified and apply only in a specific case. In a sense, decisions are the opposite of regulations. A decision would be addressed to the Universidad de Navarra, and not to "the higher education institutions of the European Higher Education Area". A decision would deal with the specific occasion in which Ireland provided tax aid amounting to 13 million € to Apple in 2003, and not with all the cases in which countries provide illegal tax aid to selected companies. This description of a decision corresponds to the *classic version* of decisions. In some legal systems, this type of legal act is called an *administrative act*.

25. Scholars started to notice that the EU was adopting frequently a type of legal act that was similar to classic decisions but slightly different. These acts were conceived for specific cases but had *no specific addressee*. These acts were used to adopt measures in organizational and budgetary matters. For example, a decision like the one that creates the Office for infrastructure and logistics in Brussels[5]. This decision is dictated for a specific case but has no addressee. One of the working groups preparing the Treaty Establishing a Constitution for Europe became aware of this fact (it was Working Group IX on Simplification) and proposed to recognize formally the existence of this new type of *decision sui generis*. The Lisbon Treaty incorporated the idea and now refers to *decisions with no addressee* in the catalog of legal acts of article 288 of the TFEU. We need to differentiate today between decisions with an addressee and decisions with no addressee.

2.4 Recommendations and opinions

26. A recommendation is a suggestion of a course of action addressed to Member States. It is not legally binding. For example, a recommendation of the Council of the EU to Member States to improve the quality of student traineeships with the aim of easing the transition from education, unemployment, or inactivity to work[6].

27. An opinion is the standpoint of one of the institutions of the EU on a specific issue. It is not legally binding. For example, the statement of the Commission considering that

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[5] Decision 2003/523/EC.

[6] Council recommendation of 10 March 2014 on a Quality Framework for Traineeships (2014/C 88/01).

a Dutch decree amending previous rules banning the use of permanent dermal fillers for aesthetic purposes was justified[7].

[7] Commission opinion of 22 July 2015 on the measure adopted by the Netherlands prohibiting the use of dermal fillers for aesthetic purposes (2015/C 241/01).

(1) Primary Law

Currently enforceable treaties

- TEU: the currently in force TEU is the updated version of the 1992 original TEU.
- TFEU: the currently in force TFEU is the updated version of the former Treaty Establishing the European Community (TEC). The TEC was the updated version of the Treaty Establishing the European Economic Community.
- Euratom treaty: though no specific attention has been directed to it in class, please bear in mind that this treaty and the Euratom community are still in force.

Charter of Fundamental Rights of the EU.

Treaties preceding the currently enforceable: For instance the Treaty Establishing the European Coal and Steel Community.

Treaties dealing with specific issues. For instance, the Merger Treaty.

Treaties dealing with geographical enlargement of the EU, also when the Communities existed.

(4) Supplementary Law

Case law coming from the two courts of the CJEU through:

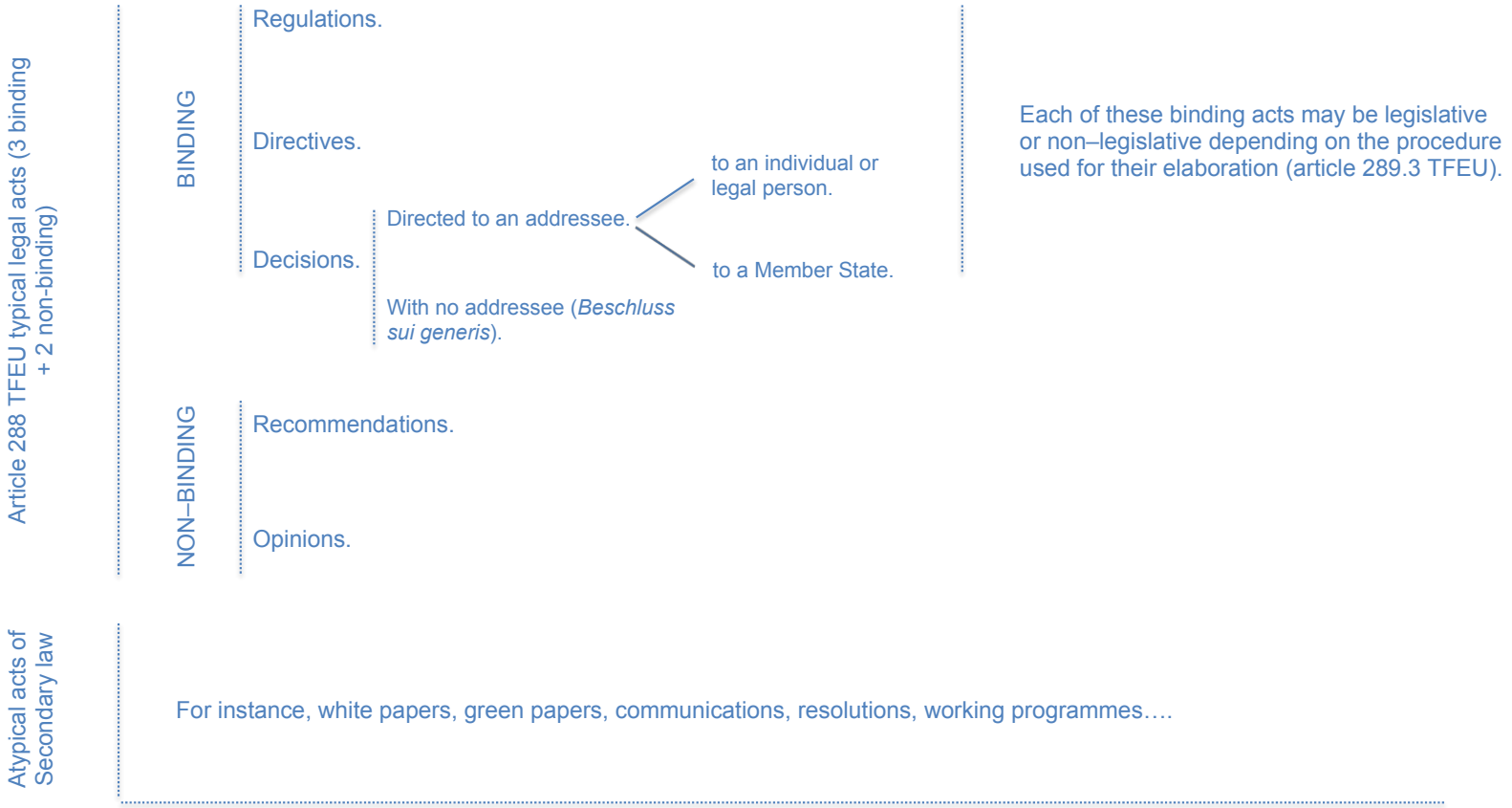
- Judgments
- Orders
- Opinions

International public law

General principles of law

Academic legal doctrine

(2) Secondary Law


Article 288 TFEU typical legal acts (3 binding + 2 non-binding)
BINDING
Regulations.
Directives.
Decisions.
Directed to an addressee.
to an individual or legal person.
to a Member State.
With no addressee (*Beschluss sui generis*).
Each of these binding acts may be legislative or non–legislative depending on the procedure used for their elaboration (article 289.3 TFEU).
NON–BINDING
Recommendations.
Opinions.
Atypical acts of Secondary law
For instance, white papers, green papers, communications, resolutions, working programmes….

(3) International treaties signed by the EU

II. THE RELATIONSHIP BETWEEN EU LAW AND NATIONAL LAW

28. The attempt to define the link between EU law and the laws of Member States has captured the efforts of EU legal scholars for decades. It is one of the oldest discussions in EU law. Already in the 1960s the amount of literature on the topic was unsurmountable.

29. Let's propose a condensed description of the relationship between EU law and national laws: EU law and national law interact in a relation of *imperfect cooperation* in which EU law has a *direct effect* in the internal spheres of Member States (principle of direct effect) and *displaces national law in cases in which both collide* (principle of supremacy of EU law). This relationship relies on the assumption that EU law is an autonomous legal system.

    Autonomy of EU law is elaborated first (Section 1). Direct effect and supremacy of EU law, second and third, respectively (Sections 2 and 3).

1. Autonomy of EU law

30. Autonomy of EU law is a fundamental assumption at the base of the explanation of the relationship between EU law and national law. Autonomy of EU law *means that EU law exists as a separate legal order or system*. Obviously, if EU law did not exist as a reality of its own, then it would make no sense to analyze the relationship between EU law and national law.

31. The recognition of the existence of EU law as an autonomous legal system is the starting point from which the CJEU explains the relationship between EU law and national law. Autonomy has to be explained first.

32. Autonomy of EU law has *several meanings*.

33. Firstly, autonomy is the above said: EU law *exists as a legal order or a legal system*. Autonomy means, hence, *separate* existence, the fact that EU law is *different from international law and national law*. The CJEU considers this as a given fact. The reasoning of the CJEU goes along the following: EU law is not an invention of this court but *something we have to acknowledge*.

34. Secondly, autonomy of EU law also means that EU law has its own *original legal sources that are binding per se*. *The force of EU law comes from independent legal sources and not from the legal sources of national law*.

35. Thirdly, autonomy of EU law is that EU law *is self-referential*. EU law is considered to be self-referential because EU law forms a complete system *that is able to provide solutions to legal issues with no aid from international law nor national law*. The CJEU affirms that EU law *has a logic of its own, different from that of internal law and national law*. This logic is *the logic of political integration*. According to the CJEU, integration inspires EU law. Integration is a yardstick that the CJEU uses to interpret EU law.

36. Fourthly, for the CJEU autonomy of EU law implies *the capacity of the CJEU to shield EU law from the effect of international law*. The CJEU understands autonomy as its own power

to decide how international law shall be implemented in the EU. The *Kadi case*[8] and the *Mox plant case*[9] are good examples of this position of the CJEU.

37. Fifthly, the CJEU interprets autonomy as the power to impose a uniform implementation of EU law across the Union. This avoids potential disparities in interpretation and implementation. This way, for example, the Spanish Tribunal Supremo will apply EU law in the same way as the French Conseil d'État, or the Italian Consiglio di Stato.

38. Some scholars summarize the above-said by stating that the CJEU understands autonomy of EU law as *the capacity of the CJEU to act as if it were the court of a sovereign power*.

    Is this description of autonomy precise? Is the autonomy of EU law to be understood in the exact terms explained so far?

39. The way that the CJEU defines the autonomy of EU law may be clarifying but it is not fully accurate. Actually, *the type of autonomy of EU law that the CJEU describes does not correspond to how in real life EU law, national law, and international law intermingle*.

40. Please take into account the following: EU law *depends* on national law. EU law is in fact implemented, made real, *through the different national laws of Member States*. Furthermore, EU law is also *influenced by international law*. This cannot be ignored. The idea that EU law remains isolated from national law and international law is not precise. The idea that EU law is uniformly applied in all the EU to the last word is not precise either. *Autonomy of EU law cannot be conceived as independence*. EU law looks more like a hybrid product of EU, international and national rules than a pure one made only of EU rules. This argument is not new, nor revolutionary. Older texts raised the point[10].

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8 References C-402/05 and C-415/05.

9 Reference C-459/03.

10 Please check *La specificité du droit communautaire* from Léontin Constantinesco, in the *Revue trimestrielle du droit européenne*, volume 2, 1966, pages 1-30.

2. Direct effect of EU law

2.1 Introduction

Three ideas have to be outlined initially.

41. First. The major novelty that the doctrine of direct effect of EU law brings is that *it is EU law, and not national law, who decides how EU law is going to impact internal legal situations*[11] *and legal relationships*[12] *in Member States*. This is quite different from what happens with international law because the effect of international law in the internal sphere of States is decided by national law.

42. Second. EU law derives from different legal sources (please recall what a source is from Section I of this lesson). The type of source is *the first indicator* of the effect of EU law in the internal sphere of Member States. Some sources (for instance, EU primary law) have a direct effect in Member States, some others do not (for instance, directives in certain cases).

43. Third. Please differentiate, (i) legal relationships between legal or natural persons and public entities (these are *vertical relationships*), from (ii) legal relationships between legal or natural persons among them (these are *horizontal relationships*). This is relevant because the effect of EU law varies depending on the type of relationship it affects.

    How do we define direct effect? The essence of the answer is in the case *van Gend & Loos* (case reference 26/62). This judgment is, perhaps, *the most important in the history of EU law*. At that time, the EU did not exist, nor did EU law as such. The three Communities existed and the law of each of the Communities existed. For the sake of clarity, we will refer to EU law in the explanation.

2.2 Case 26/62 van Gend & Loos

44. The Dutch company *van Gend & Loos* sued the Dutch customs authorities for infringing the prohibition of article 12 of the Treaty Establishing the EEC ("**TEEC**"). Article 12 ordered that, after the entry into force of the treaty (1st of January 1958), Member States would not introduce new duties on imports or exports between them. For example, after the 1st of January 1958, France could not raise the amount of export duties[13] that a car manufacturer like Citroën had to pay for selling cars in Italy.

45. Since the TEEC was primary law, *van Gend & Loos* was requesting that the Dutch authorities comply with a command of primary law. Since the case was on the legal relationship between a private company and Dutch public authorities (in this case, customs authorities), the legal relationship of the case was a *vertical relationship*.

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11 The legal situation of someone must be understood as all his or her rights and obligations.

12 A legal relationship is a link between two or more subjects that is qualified by the law for some reason in the sense that one owes something to the other. For example, law qualifies the link between a seller and a purchaser as a legal relationship. The law also qualifies the link between a tax authority and a tax-payer as a legal relationship.

13 Export duties are the tax that an exporter must pay to the customs authority.

What happened?

46. *Van Gend & Loos* imported from Germany several tons of the chemical solution urea-formaldehyde. When paying the duties for the import it found that the Netherlands had increased the custom duties for this type of product in March 1960, well after the TEEC had entered into force the 1st of January of 1958. The increase was based on a rule of Dutch national customs law. *Van Gend & Loos* objected before the Dutch national judicial authority (in this case, the Dutch *Tariefcommissie*) arguing that article 12 TEEC had been infringed, but the claim was not answered because the judges *doubted whether the prohibition of article 12 of the TEEC could be considered as law that the court could apply to solve the case that the company was bringing*.

47. The Dutch judicial authority asked the CJEU using the preliminary reference procedure. Do not worry if you do not know now what the preliminary reference procedure is, we will analyze it in Lesson 6. Important now is the answer that the CJEU gave to the Dutch judicial authority.

48. On the one side of the discussion were the Netherlands, supported by Belgium and the Federal Republic of Germany. Fundamentally this side contended that the prohibition to raise customs duties of article 12 of the TEEC was a matter of international law that only affected Member States and not private parties. Hence, only a Member State of the EEC could sue the Netherlands because of the infringement of article 12 TEEC, but not a private company negatively affected by such infringement. They defended that the implementation of article 12 was an issue that the CJEU could only judge if the Netherlands was sued by another country of the EEC.

49. On the other side of the argument were *van Gend & Loos* and the Commission. The Commission was conscious of the relevance that the decision of the CJEU would have. It argued that, if control over compliance of EU law was considered an issue of international law in which only Member States would intervene, then citizens would not be able to invoke the rights that EU law granted them. This implied that only Member States would have the legal power to request other Member States to comply with EU law and that Member States would be free to apply EU law in the manner that their internal rules established. This would be a major blow to the idea of securing a uniform implementation of EU law across the Union. It would also have been a blow to the purpose of EU law of granting rights to the citizens of Member States because they would not have the opportunity to invoke them before a court.

50. Finally, the CJEU answered to the *Tariefcommissie* stating that article 12 TEEC had direct effect and, therefore, could be invoked by *van Gend & Loos* in the case. The reasoning of the CJEU was the following:

51. EU law is an autonomous legal order (please recall what autonomy of EU law is). EU law creates rights and obligations for Member States *but also for citizens*. Citizens are also subjects of EU law and, therefore, must be able to satisfy the rights that EU law grants them. When the judgment on *van Gend & Loos* was issued, the main purpose of EU law was to establish a common market.

52. EU law is directly applicable in Member States. Direct applicability means that the rules of EU law become an integral part of the law in force in Member States automatically from the moment in which EU law is validly approved.

53. EU law is not only directly applicable, but it can also foresee that some of its rules directly impact legal situations and relationships in Member States with no need for a previous intervention of national law. EU law decides when this is the case, not national law. The CJEU underlined that *direct impact of EU law in Member States will occur if the rule of EU law is, (i) clear, (ii) unconditional, and (iii) absolute*.

54. Citizens shall be able to invoke before a national court the content of those EU rules, and that national court has the duty to enforce the content of those EU rules. In fact, if the national court fails to do so, the Member State of the court may be liable for the failure to implement EU law properly.

55. Please note that you may have overlooked that there exist direct applicability and direct effect. They are not the same. Direct applicability is a prerequisite for direct effect: if an EU rule is not directly applicable, it cannot have direct effect. Direct applicability of a rule of EU law refers to the fact that the moment the rule is issued by the EU it becomes a rule that integrates the law in force of Member States in the same way the rest of their internal rules do. Direct effect of a rule of EU law happens when the rules that are directly applicable *impact legal situations and relationships in Member States*.

56. You can now better understand the key paragraphs of the judgment. Please find an extract below:

VAN GEND EN LOOS v NEDERLANDSE ADMINISTRATIE DER BELASTINGEN

Grounds of judgment

[...]

B—*On the substance of the Case*

The first question of the Tariefcommissie is whether Article 12 of the Treaty has direct application in national law in the sense that nationals of Member States may on the basis of this Article lay claim to rights which the national court must protect.

To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.

[...]

The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

2.3 Direct effect of primary law, regulations, directives, and decisions

2.3.1 Primary law

57. In *van Gend & Loos*, article 12 TEEC was considered. The case was on a rule of primary law. The CJEU concluded that this rule had direct effect because it was a prohibition formulated in a *clear, unconditional, and absolute* fashion. The case affected a *vertical relationship* (between a private Dutch company and the Dutch customs authorities).

58. Progressively, in the decades following *van Gend & Loos*, the CJEU has recognized the direct effect of rules of primary law that do not necessarily fulfill the requirements of *van Gend & Loos. Today the CJEU admits that every piece of primary law can have direct effect and be invoked before a national judge.* This is also in cases dealing with horizontal relationships (for example, case *Familiapress v. Bauer*[14]).

59. Note that the CJEU has also admitted the direct effect of primary law establishing a prohibition set in rather unclear terms, instead of in clear ones (cases *Iannelli & Volpi SpA v. Ditta Paolo Meroni*[15], *Defrenne v. Sabena*[16]). The CJEU has admitted the direct effect of primary law establishing a prohibition that was conditional instead of unconditional (case *Martínez Sala v. Freistaat Bayern*[17]). The CJEU has admitted the direct effect of primary law establishing relative prohibitions instead of absolute ones (case *van Duyn V. Home Office*[18]).

14 Reference C-368/95.
15 Reference 74/76.
16 Reference 43/75.
17 Reference C-85/96.
18 Reference C-41/74.

But what about the binding sources of EU secondary law (regulations, directives, decisions)? Do they have a direct effect as the rules of primary law?

2.3.2 Regulations

60. Recall that according to article 288 TFEU, regulations are directly applicable in all Member States. The moment they are approved by the EU, they automatically integrate the list of rules that apply in each of the Member States.

Regulations are directly applicable. Are they directly effective?

61. Regulations *have a direct effect on vertical and horizontal legal relationships if the regulation in question establishes so*. In a sense, it is up to the regulation to determine the extent of its effect. The regulation can contain rules that have a direct effect on a legal relationship, but they can also contain rules that do not have a direct effect because they require further action by Member States.

62. An example of a regulation with direct effect is article 3 of the regulation on the trade of seal products[19]. The article establishes strong restrictions that are directly effective because they affect the legal situation of individuals in the business of seal products trade with no need for legal action of Member States. Because of article 3 of this regulation, those involved in the trade of seal products cannot trade freely, regardless of whether a national rule on the matter exists or not.

63. An example of a regulation that is directly applicable but does not have direct effect is article 12 of the regulation on common rules for the operation of air services[20]. According to article 12, aircraft used by a Union carrier[21] has to be registered. But it is up to the Member State where the carrier has its operating license to decide whether the registration of the aircraft is going to be in a register of that Member State, or in the register of the Union. Consequently, before article 12 can be invoked by a party before a court, the Member State where the carrier has its license has to do something: it has to choose if the registration of the aircraft will be in its territory or in the register of the Union. Only after can be article 12 fully effective. This article is directly applicable in the Union but has no direct effect because before it can be invoked before a court Member States need to intervene by choosing the register for aircraft of Union carriers.

2.3.3 Directives

64. Remember what directives are: they are legal acts addressed to Member States (*not to legal, nor natural persons*) and are binding as to the result to be achieved.

65. In principle, directives establish obligations *only for Member States and not for natural and legal persons in the Member States*. Fulfillment or non-fulfillment of the content of a directive is a business between the Union and Member States. The only party that can demand the fulfillment of a directive is the Union or another Member State.

19 Regulation (EC) 1007/2009.
20 Regulation (EC) 1008/2008.
21 Iberia is a carrier. Lufthansa is another one.

66. Since directives are not addressed to citizens, citizens are not entitled to invoke a directive before a court, and, therefore, we say that directives do not have direct effect on a vertical relationship, nor on a horizontal one.

    But this is not always the case.

67. The CJEU has admitted that in certain circumstances citizens can invoke directives before a judicial authority. The CJEU has admitted that *in certain circumstances directives have a direct effect.*

    In which circumstances?

68. The CJEU admits the direct effect of directives on *vertical* relationships (when a citizen is acting against a public entity) if, and only if, (i) the Member State of that public entity *fails to implement the directive when it is supposed to do so*, and (ii) the content of the directive that the citizen invokes contains a *clear and unconditional legal obligation*. The CJEU set this doctrine in several judgments; for example, in cases *Van Duyn v. Home Office*[22] and *Ratti*[23].

69. In *Van Duyn v. Home Office*, the CJEU admitted the direct effect of the directive on the free movement of citizens[24] in a case in which a Dutch lady (Ms. van Duyn) acted against the British authorities because they did not let her enter the UK. The UK did not allow Ms. van Duyn to enter because the UK had not implemented the content of the directive timely and that implied that the legislation of the UK was not updated. Had the UK legislation been updated following the directive, van Duyn would not have been refused entry. The CJEU admitted that van Duyn could invoke the directive before a judge and ask for admittance in the UK. The CJEU accepted the direct effect of the directive in this vertical relationship.

    Why would the CJEU admit the direct effect of a directive if directives are obligations *addressed only to Member States*?

70. The best argument of the CJEU is that the alternative option would invite Member States not to fulfill directives. Think about it: if a Member State fails to comply with a directive and the citizens who are negatively affected because of the non-fulfillment of that directive are not able to invoke it before a court, then the Member State that is failing to comply with the directive is benefiting from its own failure. By frustrating the directive, the infringing Member State frustrates the purpose of EU law and, at the same time, is protected from the claims of its citizens.

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22 Reference 41/74.

23 Reference 148/78.

24 Directive 64/221 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.

What about the direct effect of directives on horizontal relationships? Could, for instance, a citizen invoke a directive that protects consumers from private companies that offer their services on the street?

71. The answer of the CJEU is *no*. The *Marshall*[25] and the *Dori v. Recreb*[26] cases are clear in this respect. Directives are addressed to States and the purpose of recognizing their direct effect on vertical relationships has to do *only* with Member States taking advantage of their failure to implement them. When EU law wants to grant rights to citizens that can be invoked before a natural or a legal person, then the EU shall do so using regulations and not directives.

72. Nevertheless, there are exceptions. In certain cases, the CJEU has admitted that a directive may have direct effect on horizontal legal relationships.

73. The Court declared the direct effect of directives on some horizontal relationships by way of considering that the relationship, actually, was, in reality, a vertical one because it was between a private party and a public entity. In these cases, the CJEU considers that one of the parties may act as a private party, but has to be considered a public entity. This happened with the West Hampshire Area Health Authority. This authority acted as an employer in its relation with Ms. Marshall[27], a nurse. The CJEU considered that the relationship between Ms. Marshall and her employer was not a horizontal relationship between employer and employee, but a vertical one because the health authority pertains to the UK Government. Therefore, the directive could have a direct effect on this specific relationship if the rest of the circumstances required to recognize the direct effect of a directive concurred. This was the approach also in *Foster and others v. British Gas*[28].

74. A second exception. In two isolated judgments, the CJEU admitted that a directive could be invoked by a private party before another private party (horizontal legal relationship) because the Member State of the case had failed to implement the directive. These are the *CIA Security v. Signalson and Securitel*[29] case, and the *Unilever Italia v. Central Food*[30] case. However, they are very particular cases: in both of them what the failure to implement the directive entailed was that one of the parties of the case was applying outdated technical rules. These cases have to be considered *exceptional exceptions*.

75. A third exception. Another way that the CJEU has admitted the direct effect of directives on horizontal relationships is by declaring that the directive contains a general principle of EU law. Since general principles of EU law are primary law, and since primary law has a direct effect on horizontal relationships, by declaring that part of a directive is a general principle of EU law, the CJEU converts that part of the directive into law that has direct effect on horizontal relationships. This reasoning is problematic and has been strongly criticized. Examples are the *Mangold*[31] and the *Kücükdeveci*[32] cases.

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25 Reference 152/84.
26 Reference C-91/92.
27 Marshall case, reference 152/84.
28 Reference C-188/89.
29 Reference C-194/94.
30 Reference C-443/98.
31 Reference C-144/04.
32 Reference C-555/07.

76. Additionally, the CJEU has established that a directive can affect *indirectly (not directly)* a horizontal relationship.

How?

77. Through the interpretation that national judges make of national law in light of EU law. In some cases, despite the fact that a directive does not directly affect a case between two private parties, the content of the directive may inspire the solution of the case and, therefore, have an indirect effect on the case. For instance, a judge may have to solve using national law a case of sex discrimination in the dismissal of an employee. Think, in a pregnant woman being dismissed because of her inability to substitute another employed woman that is on pregnancy leave (*Webb v. EMO Air Cargo*[33] case). Initially, the national court may come to the conclusion that according to national law there was no discrimination in the dismissal. But the court may interpret the content of the national law on discrimination *taking into consideration a directive on the issue*, and end up changing its conclusion. This happened with Ms. Webb. Initially, national courts considered that according to national law there was no discrimination when she was dismissed, but the CJEU indicated that the interpretation of national law had to change because of the Equal Treatment Directive[34]. Inspired by this directive the national court *interpreted the national law on discrimination differently than before* and accepted the claim of Ms. Webb.

78. The duty of national courts (it is also a duty of national executives) to interpret national law as far as possible in light of EU law is the *duty of consistent interpretation*. As in the case of Ms. Webb, consistent interpretation may cause that a directive affects *indirectly* a horizontal relationship.

2.3.4 Decisions

79. Decisions are directly applicable and can have a direct effect on horizontal and vertical relationships.

80. Decisions addressed to private parties (natural and legal persons) can have a direct effect on the vertical and horizontal relationships of those private parties. Therefore, private parties can invoke an EU decision before a judge in cases in which they are acting against a public authority, and also in cases in which they are acting against another private party.

81. Decisions addressed to a Member State can have a direct effect on the relationships between that Member State and a private party (vertical relationships). This was recognized in *Grad v. Finanzamt Traunstein*[35].

82. Can decisions addressed to Member States have a direct effect on horizontal relationships? The reasoning explained for directives applies. In principle, no.

33 Reference C-32/93.
34 Directive 76/207/EEC.
35 Reference C-9/70.

3. Supremacy of EU law

3.1 Introduction

83. Supremacy is a complement to the doctrine of direct effect. Whereas direct effect makes sure that EU law impacts legal relations within Member States with no need of national law mediation, supremacy makes sure that if a national law collides with EU law and disables the effect of EU law, the problematic national law is *displaced* and leaves free way to EU law.

84. Please be aware that the doctrine of supremacy is relevant *only* in cases of conflict between EU law and national law. Supremacy is, then, a mechanism that is activated j*ust in a reduced number of problematic cases*. It is a *rule to solve conflicts*. Supremacy does not define itself alone the type of relationship existing between EU law and national law. It is just an aspect of it. Should an excessive emphasis be put on supremacy, it may mislead the efforts to understand the relationship between EU law and national law. Normally legal rules are obeyed voluntarily. With EU law the same happens. Normally, EU law is respected by Member States. The number of cases in which supremacy applies is reduced.

3.2 Case 6/64 Costa v. ENEL

Just as the CJEU created the doctrine of direct effect in *Van Gend & Loos*, it created the doctrine of supremacy in *Costa v. ENEL*[36].

What happened?

85. The Italian citizen Mr. Flaminio Costa presented a claim before an Italian court, the Giudice Conciliatore of Milan. The Giudice Conciliatore found itself in the need to ask the CJEU on the interpretation of several articles of the Treaty Establishing the European Economic Community ("**TEEC**"). The question was made using the preliminary reference procedure. As indicated above, do not worry if you do not know now what the preliminary reference procedure is, we will analyze it in Lesson 6. Important now is the answer of the CJEU.

86. The Giudice Conciliatore formulated its question because Mr. Costa invoked in his claim a number of TEEC articles (102, 93, 53, and 37). Broadly, these articles protected fair competition between companies of the Common Market, granted freedom of establishment across the territory of the EEC, and prohibited national commercial monopolies.

87. Mr. Costa alleged that an Italian law had infringed these rules of the TEEC. The law was Italian Law number 1643 of 16 December 1962. The law allowed the Italian Ente Nazionale Energia Elettrica (ENEL) to nationalize the assets of private Italian electricity companies, including those of the company Edison Volta, of which Mr. Costa was a shareholder.

88. In the case, in addition to the question on the interpretation of articles 102, 93, 53, and 37 TEEC, a critical question had to be answered before: what if the content of the Italian Law 1643 was contrary to the TEEC? How should the Giudice Conciliatore

[36] Reference 6/64.

proceed? Should the court solve the case according to Law 1643, or according to the TEEC? Was the court obliged to apply national Italian law contravening the TEEC or should it apply the TEEC and contravene Italian law instead? These were challenging questions at the time because they were asking the CJEU to decide whether EU law would follow the model of traditional international law, or follow a new path.

89. The CJEU declared that *national law could not be an obstacle to the implementation of EU law*. This is what the supremacy of EU law means.

    How did the CJEU reason its position in favor of the supremacy of EU law? The following was argued:

90. The moment a Member State enters into the EU, it agrees to limit its sovereignty so that the common goals of European integration can be achieved. One of the limits that a Member State accepts is EU law. For a Member State participating in the EU this entails being bound by an autonomous legal system (EU law) that is directly applicable in the Member State. Please recall what autonomy and direct applicability of EU law mean (Sections II.1 and II.2 above).

91. It is *critical* that this autonomous legal system that EU is be equally implemented across the Union, and that Member States are not allowed to block the effects of EU law by way of adopting internal national law contravening EU law. If every different Member State chose to give precedence to its internal law over EU law, then the possibility exists that EU law has a different effect in different Member States. Should this be the case, the political purposes of the EU –for instance creating a unified market in the Member States– would crumble.

92. Therefore, the CJEU concluded, Member States cannot nullify EU law with internal law. EU law has precedence over national law. *EU law overrides national law*.

93. You can now better understand the key paragraphs of the judgment. Please find an extract below:

Grounds of judgment

On the submission that the court was obliged to apply the national law

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7.

The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories. Wherever the Treaty grants the States the right to act unilaterally, it does this by clear and precise provisions (for example Articles 15, 93 (3), 223, 224 and 225). Applications, by Member States for authority to derogate from the Treaty are subject to a special authorization procedure (for example Articles 8 (4), 17 (4), 25, 26, 73, the third subparagraph of Article 93 (2), and 226) which would lose their purpose if the Member States could renounce their obligations by means of an ordinary law.

The precedence of Community law is confirmed by Article 189, whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. Consequently Article 177 is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise.

3.3 Supremacy over fundamental rights of a national constitution

94. The CJEU went a step further and declared that EU law overrides rules on fundamental rights of a constitution. The CJEU declared so in *Intenationale Handelsgesellschaft*[37], in reference to the constitutional principles and rights enshrined in the Federal Constitution of Germany of an import-export company based in Frankfurt. Specifically, the constitutional principles were the principle of proportionality, the constitutional right of freedom of action and disposition, and the constitutional right of economic liberty.

    Why would the CJEU argue that EU law overrides fundamental rights?

95. The CJEU contended that, despite the fact that EU law overrides internal constitutional rules on fundamental rights, these fundamental rights remain protected in EU law because fundamental rights are general principles of EU law. Consequently, in case a national rule on fundamental rights conflicting with EU law has to be overridden, the overriding rule of EU law will always respect the fundamental rights of the citizen involved since fundamental rights are also part of EU law.

96. Please read paragraphs 3 and 4 of the judgment:

JUDGMENT OF 17. 12. 1970 — CASE 11/70

The protection of fundamental rights in the Community legal system

3 Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.

4 However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system.

[37] Reference 11/70.

3.4 What supremacy entails for conflicting national law

What is the effect of supremacy on conflicting national law? What happens when national law and EU law collide?

97. When a national authority thinks that a national rule of law and EU law collide, that authority shall *try to interpret that national rule so as to make both of them compatible*. This duty to interpret national law in light of EU law is what we named above as the duty of consistent interpretation (please recall the end of Section II 2.3.3). The duty of consistent interpretation was formulated in the case *von Colson*[38].

98. If there is no way that both rules can be combined and the collision is unavoidable, then the national authority shall not apply in that specific case the national rule conflicting with EU law. We express this by saying that the national authority shall *displace* or *disapply* the national rule. This was established by the CJEU in the case *Simmenthal II*[39].

Does that mean that the national law that is being displaced because of its collision with EU law is automatically null and void?

99. *No*. Let us insist: no.

100. From the standpoint of EU law, the fact that a rule of national law contravenes EU law entails that that national rule cannot block the implementation of EU law, but it *does not entail a judgment on the validity of the national law*. The command of EU law to national authorities is: you shall not apply to a case a rule of national law contradicting EU law, but the judgment on the validity of that national law is not for EU law to make but for the internal legal system of Member States. EU law abstains itself from stating whether national law is valid or not. That is out of the scope of EU law. EU law can only demand that EU law is implemented. *Supremacy of EU law means disapplication of conflicting national law, but not invalidation*. The invalidation of the conflicting national law must occur according to internal constitutional law.

What authorities of a country are obliged to disapply national law if it conflicts with EU law?

101. The judicial authorities of the country and *also its administrative authorities, including those of lower territorial levels, such as regional and local administrative authorities*. This was established in the case *Fratelli Costanzo*[40].

38 Reference 14/83.
39 Reference 106/77.
40 Reference 103/88.

3.5 The reply of constitutional courts to the supremacy of EU law

102. Some national constitutional courts have refused to admit the supremacy of EU law to its full extent. Among them, the German, the Spanish, and the Danish.

103. Constitutional courts underline that the powers that the CJEU has were transferred by Member States in full compliance with their respective national constitutions. The powers of the CJEU are, therefore, *derived*. National courts argue that the fact that the transfer of power in favor of EU institutions was done respecting national constitutions is not compatible with actions of EU institutions (for instance, the CJEU) infringing national constitutions because the power EU institutions hold comes, precisely, from those constitutions.

104. Constitutional courts have questioned the supremacy of EU law in cases concerning fundamental rights (cases *Solange I*, *Solange II* in Germany) and in cases in which the EU is deemed to exercise power beyond its limits (*Maastricht* decision in Germany). To an action that the EU carries out beyond its competences, we name it an *ultra vires* action.

105. The last chapter of the discussion between national constitutional courts and the CJEU took place on 5 May 2020 when the Federal Constitutional Court of Germany declared that the European Central Bank exceeded its competences by establishing a purchase program of government bonds that the CJEU had previously approved[41]. The German court used, perhaps, improper language for referring to the judgment of another court, and stated that the approval of the CJEU was done recurring to an *arbitrary interpretation* of the EU Treaties.

106. We can see how there are two different positions on supremacy: that of the CJEU and that of some national Courts. The question is if there is one authority over all of them that solves the discrepancy. The answer is: no. There is not only one correct answer to the question on which is the legally best position. Is it that of national courts, or that of the CJEU?

107. Scholars denominate this situation as one of *legal pluralism in the EU*. We have a state of affairs in which different highest courts (the CJEU and national constitutional courts) approach the collision between EU law and national constitutional law differently. But...are the positions of the CJEU (absolute supremacy of EU law over national law, even constitutional law) and of constitutional courts (just relative supremacy of EU law) actually confronted? Well, they are, but not as much as it may seem at first sight.

108. Please think that it is a rule of EU constitutional law that the constitutional identity of Member States be respected. That includes their constitutions. This is the content of article 4.2 TEU. Additionally, respect for the fundamental rights of citizens is also part of EU law. Hence, EU law compels the CJEU to respect both the constitutional identity of Member States and the fundamental rights of citizens, which is what the different national constitutions also do. On the other hand, it must be underscored that national courts *presume that the EU acts legally*. National courts also presume that when the CJEU invokes the doctrine of EU law supremacy, it does so respecting the limits that national courts have set. In principle, then, national constitutional courts will respect the supremacy of EU law. Only in exceptional cases, they will challenge it.

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41 Judgment 2 BvR 819/15.

109. The CJEU and national courts *tend to respect the decisions of each other*. We describe this situation by saying that the CJEU and national constitutional courts are engaged in a *structural dialogue* that channels their discrepancies. Conflict between EU law and national law is an exceptional situation, and so is conflict between the CJEU and national constitutional courts.

LESSON 5 – THE EXECUTIVE ACTION OF THE EU

Content

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- *Examination procedure*
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1. We shall now analyze the executive action of the EU. This lesson explains (i) first, *what an executive is* (Section I) and, (ii) second, the executive *of the EU* (Section II).

I. AN EXECUTIVE BRANCH

1. What is the executive?

2. The executive is the second branch in the theoretical explanation proposing that power shall be exercised jointly by (i) a legislative, (ii) an executive, and (iii) a judiciary. The executive is concerned with the implementation of the rules that the legislative dictates.

   What does the executive actually do? Which are the typical actions of the executive power?

3. The answer cannot be concise because *the range of fields in which the executive intervenes is very large*. For example, an executive negotiates international treaties; defines social policies; builds and takes care of infrastructures; secures communication networks; protects public order (police); fosters culture and education (museums, schools, universities…); supervises the economy; assures food security, or; defends a country from cyber-attacks and other threats.

4. Since the scope of action of the executive is too wide to encapsulate in a comprehensive definition, some scholars argued that the best way to explain what the executive does is by stating that *an executive does what the legislative power and the judiciary do not do*. This explanation, however, has a drawback: it does not inform us well about the functions and actions of the executive power.

5. An alternative is to *describe the executive power as the combination of two fundamental actions*: *to govern and to manage*. The executive power of a country fundamentally *governs and manages* the fields and matters that the representatives of the people entrusted to it in the Constitution and legislation. The decision on which specific matters shall be governed and managed by the executive is *a political decision* that in democratic countries is for the representatives of the people to take. The decision depends on what society deems appropriate at a certain moment. Therefore, the tasks of the executive vary depending on countries and time. This can be seen in the fact that it was not until recently that executives were charged with the protection of the environment and animal welfare.

6. *To govern* is *to steer*[1]. To govern is to define the main goals and purposes of the governed entity. It usually consists of adopting important choices. For example, to govern is to decide that the citizens of Spain shall be locked down during a grave health emergency; or to decide that house rents shall be capped in order to lower housing prices; or to decide that a water transfer canal system shall be built in a country so that the humid regions supply water to the dry ones during severe droughts.

[1] *Conducir.*

7. *To manage*[2] is to take care of and run. For example, to manage the field of energy means to supervise all aspects affecting energy production, energy transport and commercialization, energy security and environmental standards of energy, energy marketing, energy supply contracts with households…, etc.

8. Both the action of governing and managing are *subject to legislation*. Legislation orders the executive to govern and to manage, and establishes the scope and limits of these actions. This is why *we also say the action of the executive is to implement legislation*.

9. It is the Government that governs and the Administration that manages. In the USA the terminology is otherwise and it is the Administration (please recall how we say, the *Biden Administration*) that governs and the Government that manages. Both functions (to govern and to manage) and both bodies (Government and Administration) are part of the executive.

10. Nevertheless, the distribution of the functions of governing and managing between Government and Administration is not clear-cut. In order to adopt decisions, a Government *needs the technical assistance of the civil servants of the Administration*. This means that an Administration *does not just manage, it also assists the Government in the function of governing*. Additionally, a Government will *also need that some of the goals it wants to attain be incorporated into legislation and, therefore, the Government will need the cooperation of the legislative power*. Strictly speaking, the Government cannot fulfill its functions alone.

    An example may help.

11. Imagine that the Government of Spain wants the country to become a leader in connected and automated mobility (CAM). In order to succeed, the Government would have to decide and take a series of steps. For instance, the Government would need to order (i) that companies and experts researching in the field be invited to create a branch in Spain by way of offering attractive taxation; (ii) that existing 5G networks be expanded, (iii) that a new industrial site with adequate facilities and plenty of space close to a metropolitan area be offered to incoming industries so that they all are based together in a hub; (iv) that long-distance autonomous driving experiments are allowed in Spanish roads, and; (v) that the selling and driving of autonomous cars are authorized.

12. The Government of Spain would not have the capacity to take these steps alone. Firstly, the Government would require the *technical* and *legal* expertise of the Spanish Administration in order to issue the legal acts these steps demand. For instance, the Government *would need the advice of civil servants of the ministry in charge of transport networks (Ministerio de Fomento)* to draft a new Traffic Circulation Regulation updated to the reality of connected and automated driving. Secondly, the Government would also want *the Spanish Parliament* to update the existing Law on Traffic, Automobiles Circulation, and Road Safety in order to authorize connected and automated mobility.

[2] *Administrar.*

2. The action of an executive branch

How does the executive act? Which are the channels that it uses to govern and manage?

13. The executive intervenes in social life by (i) *issuing formal acts through its organs* and by, (ii) *carrying out physical or non-formalized action through its organs*.

14. The term organ designates a component of a wider organization with a specific function within that organization. When the organ of an organization acts *it is considered that the whole organization acts through that organ*. For example, when the provincial brigade for migration and borders of the National Spanish Police provides a student coming from outside the Schengen area with a foreign student identity card *it is considered that the executive of Spain as a whole provides the student the identity card because that provincial brigade is an organ embedded in the Spanish executive*. The term organ was borrowed from anatomy and encloses the comparison of an organization with a living body, and the comparison of the components of the organization with the living organs of a body. For our purposes, an organ is to be considered the combination of a person or group of persons working for a specific mission within an organization and holding certain legal powers to do so, plus the material means and legal rules that help that person or persons achieve their mission. An organ can be personified by one or several persons.

Let us return to the forms of action of the executive (formal acts and physical, non-formalized action)

15. With a *formal act*, we understand an act of communicating carried out *following a pre-fixed pattern*. Formal acts are adopted mostly in written and seldom orally. A written formal act is, for instance, the act of signing the minutes of a meeting of civil servants, or the act of signing a fine. We also say that the outcome of that action is a formal act and, therefore, we say that the minutes and the fine are formal acts, not just the act of signing.

16. By physical or non-formalized intervention we understand any human exteriorized action that is carried out according to no pre-established pattern. For instance, answering a phone call, sending an email, running a COVID-19 PCR test, fixing a road, or checking the moisture of the flowers of a public garden on a morning of June is physical, non-formalized, action.

17. All of the EU legal acts we considered in Lesson 4 are formal acts. Legal acts are formal acts that somehow affect the rights and obligations of a natural or legal person.

18. We mentioned in Section I of Lesson 4 that EU legal sources or acts impact the life of persons in different degrees of intensity and have to be contested with different means. This happens in EU law and outside EU law. For instance, the way of reacting against a traffic sanction issued to an individual on the grounds of a specific infringement (for example, a sanction for driving at 03:00 am with no lights on the campus road) is not the same as the way of reacting against an illegal national regulation on traffic that the Government approves.

    The example indicates a first important distinction that needs to be made within legal acts of the executive: *resolutions* and *material legislation*.

19. *Resolutions* are rules addressed to one or several *individually designated* persons in regards to a specific situation. The enforceability of resolutions expires when the situation that the resolution refers to is over. Beyond that moment resolutions are ineffective. For instance, in the case of a resolution imposing a traffic sanction, the resolution becomes futile when the addressee of the sanction satisfies it, or when the sanction is implemented by way of confiscating from the addressee the money to be paid. In the case of a resolution granting temporary permission for residence, the resolution becomes futile when the term of permission expires. This coincides with the description we made of *EU law decisions of article 288 TFEU*. We say that the decisions of article 288 TFEU are resolutions.

20. *Material legislation* is rules addressed not to individually designated persons but to a group of people defined in abstract terms (for instance, all university professors of a country, or all companies importing and exporting chemical products). These rules refer not to one specific situation but to types of situations and, therefore, they remain effective no matter how many times the situation takes place. For instance, material legislation on genetically modified organisms (GMOs) is addressed to companies that produce these organisms and requires that they ask for a specific authorization before they commercialize a GMO. That means that, no matter how many different types of GMOs a company produces, each time that company produces a different type of GMO it will have to respect the material legislation on GMOs and request authorization. Material legislation owes its name to the fact that it resembles legislation but it is not adopted according to the formalities required for formal legislation. This coincides with the description we made of *EU law regulations of article 288 TFEU*. The same applies to EU directives. If a regulation or a directive is not adopted according to one of the legislative procedures, then it is a piece of material legislation.

21. There are cases, however, in which it is not easy to determine whether a legal act is a resolution or material legislation. Telling whether it is one or the other requires careful analysis.

    Material legislation poses one more issue.

22. Scholars warned that the amount of material legislation adopted by the executives of Western countries has *grown exponentially after WWII*. Actually, material legislation outnumbers by far formal legislation of the legislative power. This phenomenon can be explained by the fact that we citizens hold States accountable for our wellbeing,

and this has forced them to issue a tremendous amount of rules for a very wide range of issues. There was no other way for States to keep up with what society expected from them than converting the executive power into a rule-making machine.

23. This is a matter of concern because executives now hold a significant amount of power that is considered to be power taken away from the representatives of the people. In order to supervise this power transfer, the rule-making activity of executives is under a set of constraints that have to do with what issues can and cannot be included in material legislation and with the procedure under which material legislation is to be produced.

II. THE EXECUTIVE BRANCH OF THE EU

24. The executive of the EU governs and manages within the scope of the powers transferred by Member States (principle of conferral, article 4.1 TEU, see Lesson 3).

Which institutions govern in the EU? Which institutions manage in the EU?

25. *The European Council with the assistance of the Commission governs the EU. The Commission, EU agencies, and the Administrations of Member States jointly manage or administer EU fields. The Council also intervenes in EU administration, but significantly less.*

26. Governing and managing are carried out through the joint action of different institutions. Additionally, Member States are key in the implementation of the goals of the executive of the EU. Their action is critical. In the government of the EU, the importance of Member States cannot be so easily appreciated as in the administration of the EU because Member States are not nominally involved in the government.

1. The government of the EU

27. The European Council is the principal institution in charge of governing the EU. This institution steers the helm of the project. This is reflected in article 15.1 TEU: "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof (…)".

28. The European Council governs through formal acts. The typical ones are *decisions* and *conclusions*. However, the European Council also governs through other formal acts; for instance, through *statements* and *declarations*.

29. Decisions of the European Council usually have an institutional purpose. For instance, they are adopted to appoint the highest-level officials of the EU (the President of the European Council, the High Representative of the Union for Foreign Affairs and Security Policy, the President of the Commission and his/her team, or, the President of the European Central Bank). The decisions of the European Council also establish the institutional organization of the EU (for example, they decide on the

different configurations of the Council[3], or on the composition of the European Parliament[4]).

30. Conclusions of the European Council fix the direction where the EU should be heading. The political direction of the EU may be explained in documents that have a longer-term perspective such as *Strategic Guidelines* or *Strategic Agendas*. These documents are incorporated into the conclusions and are part of them. The last of these longer-term strategic documents setting the political direction of the EU is the *Strategic Agenda 2019-2024* incorporated into the 20 June 2019 conclusions.

31. As explained above, the European Council is not alone in the function of governing. The Commission also plays a role.

32. On the one hand, the Commission influences the European Council in the adoption of the political guidelines for the EU. The Commission does so by providing the European Council with analysis of the issues that affect the EU. On the other hand, the Commission adequates its action to the guidelines that the European Council formally adopts. The general direction that the European Council sets is assumed by the lower levels of the Commission through different *programmatic documents*.

33. The guidelines of the European Council inspire the document that sets the general goals for the entire mandate of the Commission (5 years). This document is the *President's Political Guidelines* and is prepared by the President of the Commission as a general framework for the five-year term of the Commission. The content of the President's political guidelines is in the Commission's yearly *Work Program*, which is a document setting the goals to be reached by the Commission in the coming year. Every Directorate General of the Commission adopts a *Strategic Plan* and an *Action Plan* that specifies how the Directorate General will contribute to the goals of the Commission.

2. The administration of the EU

2.1 Introduction

34. The structure of the administration of the EU has a beauty of its own. Once again, we have before us the picture of a compound that aims at making 27 different potent administrative pieces of machinery work together with the EU. As stated above, Member States are critical in EU administration. This implies that in EU administration or management *Member States also participate and not just EU institutions*.

35. The administration of the EU is the object of study of a sub-field in EU law scholarship that is termed *EU administrative law*. In EU administrative law, scholars of diverse legal traditions try to make sense of the immense amount of administrative rules that the EU approves. Administrative rules are those referring to the *management*

[3] European Council Decision EUCO 22/10 of 16 December 2010.
[4] European Council Decision (EU) 2023/2061 of 22 September 2023 establishing the composition of the European Parliament.

of social life (for example, rules establishing a common market, setting a transport network, common border management…, etc.).

36. The initial point to understand EU administration is *the distinction between*, (i) administration in which *only EU institutions intervene* (for instance, the Commission, or an EU agency, or the Commission and an EU agency); (ii) administration in which *only one Member State* intervenes, and; (iii) administration in which several Member States, or Member States plus the EU, intervene. This classification is mainly seen in continental scholarship. Scholars of the common law culture tend to obviate it.

37. To type (i) from the paragraph above we term *direct administration or direct management*; to type (ii) *indirect administration or indirect management*, and; to type (iii) *cooperative or shared administration or management*. This terminology has a French origin.

38. *Direct administration* is almost insignificant. The only examples we can mention in which EU institutions alone carry out EU administration are situations in which EU institutions administer their internal affairs. For instance, when the Commission rents a building; or when an EU agency hires an employee. In cases of affairs involving third parties (for instance, in the processing of the request of a pharmaceutical company for a medicine commercialization authorization), administration will happen through indirect or cooperative administration.

39. *Indirect administration* is the *most common mode* of EU administration. In the majority of cases, the implementation of EU administrative rules (EU administration) is done by Member States. The amount of examples of this type of administration is unlimited. For instance, when the Spanish police blocked the entrance to Spain to non-EU citizens in pursuance of the European Council decision of 17 March 2020 on COVID-19, the Spanish police was conducting EU administration *in the indirect mode*. It was not the Commission that was implementing the EU ban using Commission officials, it was the Spanish police acting as part of the administration of the EU.

    Indirect administration carried out by Member States is subject to the following constraints:

40. First. Save otherwise expressed by EU law, Member States enjoy the freedom to carry out indirect administration *choosing the means*. Member States can choose whichever internal authorities they want to use in their task of indirect administration. This principle is called the *principle of institutional autonomy*. Member States can also choose whichever procedures they want in their task of indirect administration. This principle is called the *principle of procedural autonomy*.

41. Second. When carrying out EU administration, Member States cannot implement EU law in a way that discriminates against EU law. For instance, Member States cannot decide to implement EU rules with a slower procedure than the one used for national internal administration. When conducting EU administration, Member States have to implement EU law in the same way as if they were implementing national law. This

principle is called the *principle of equivalence* and it was formulated by the CJEU. Please see case *Hans Just*.[5]

42. Third. When carrying out EU administration, Member States cannot hinder the implementation of EU law to a point in which EU law is not applied. This principle is called the *principle of effectiveness* and it was formulated by the CJEU. Please see *Deutsche Milchkontor*.[6]

43. *Cooperative administration* has steadily grown. In this mode of administration, several Member States, or several Member States and EU institutions *act jointly on the same issue*. For instance, cooperative administration occurs when Member States, the Commission, and the European Medicines Agency jointly decide on the authorization of a new vaccine that will be commercialized in the whole internal market.

44. Cooperative administration is *innovative* because on certain occasions it implies that the actions of the authorities of a Member State have an automatic legal effect in all the territory of the EU, whereas, ordinarily, actions of the authorities of a Member State only have effect in the territory of that Member State.

45. An example of this is the procedure where a regional wine producers association applies for registration of a designation of origin (*denominación de origen de vino*). In the procedure to grant this designation, both the Commission and the Member State of the wine area are involved[7]. The Member State will contribute to the procedure by analyzing the application of the association and sending it to the Commission if it deems it admissible. The Commission shall decide and its decision has an effect on all the EU. The analysis of the application that the Member State conducts has an impact in all the territory of the EU because it influences a decision of the Commission that will have an effect in all the EU. In reality, the geographical scope of the analysis of the national authorities in the wine designation of origin procedure automatically extends to all the EU.

2.2 Acts of the administration of the EU

46. Like any other executive in the world, the EU issues formal acts and carries out physical or non-formalized action. We will obviate non-formalized action and focus on the formal acts of EU administration.

47. As explained, the distinction between resolutions and material legislation is useful to describe the actions of administration in Member States (please recall Section I 2 above) but the EU Treaties refuse to follow it. Rather, the TFEU differentiates between delegated and implementing acts. *Delegated acts are material legislation*. *Implementing acts can be material legislation and also resolutions*. Please be careful.

48. Both delegated and implementing acts are EU *non-legislative acts* (please review Section I 1 of Lesson 4). Delegated and implementing acts are also called *regulatory acts*.

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[5] Reference 68/79.
[6] Reference C-205-215/82.
[7] Articles 48 and subsequent of Regulation (EU) 1151/2012 of 21 novembre 2012 on quality schemes for agricultural products and foodstuffs.

2.2.1 Delegated acts of article 290 TFEU

49. Delegated acts are material legislation. Through delegated acts the Commission *supplements or amends certain non-essential elements of a previous legislative act*. The previous legislative act is called the *basic act*.

50. The rationale behind delegated acts is that, occasionally, the EU legislator notices that it is more efficient that the Commission complements or supplements certain aspects of a basic act in a subsequent delegated act, as long as the Commission does not modify the main political decisions that the legislator took when adopting the basic act.

51. This mandate from the legislator to the Commission to complement or supplement legislation is a *delegation*. What happens is that *for certain matters*, the legislator of the EU (European Parliament and Council) refuses to use its legislative power and trusts the Commission *with the task of issuing that legislation because it is more efficient that the Commission does it*. By virtue of the delegation, the Commission exercises a *quasi-legislative power*.

52. The risk is, however, that the Commission exceeds the limits of the delegation and decides to adopt rules in the delegated act that only the legislator can adopt. In no case can the Commission use a delegated act to establish rules that contain a political decision. Political decisions are *only* for the legislator to take. The Commission can only complement or supplement legislation. In reality, the risk is that the Commission (part of the executive) takes power away from the legislative. This could threaten the constitutional balance of power between the legislator (EP and Council) and the Commission.

53. To prevent the danger, article 290 TFEU establishes several limits to the delegated acts of the Commission.

54. First limit. In order for the Commission to adopt a delegated act, *there has to exist a previous legislative act (a basic act) that expressly empowers the Commission*.

55. Second limit. When the legislator (European Parliament and Council) decides that it delegates its power to the Commission, *it may want to subject the delegation to one or both of the following conditions*:

    - First. That the delegation might be revoked if the European Parliament (by majority of members) or the Council (by qualified majority) decides so.

    - Second. That the delegation is conditioned to the consent of the European Parliament or the Council to the delegated act.

56. An example of how the legislator decided to delegate its power is in the following regulation on the energy labeling of electrical appliances.

28.7.2017 EN Official Journal of the European Union L 198/1

(Legislative acts)

REGULATION (EU) 2017/1369 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 4 July 2017

setting a framework for energy labelling and repealing Directive 2010/30/EU

Article 11

Procedure for the introduction and rescaling of labels

1. As regards the product groups referred to in paragraphs 4 and 5, the Commission shall rescale labels which were in force on 1 August 2017 subject to paragraphs 4 and 5 and paragraphs 8 to 12.

4. In order to ensure a homogenous A to G scale, the Commission shall adopt, by 2 August 2023, delegated acts pursuant to Article 16 of this Regulation in order to supplement this Regulation by introducing A to G rescaled labels

57. You can see that the legislator wants the Commission to intervene and help the legislator. How? By adopting a precise and homogeneous scale of labels of energy efficiency of appliances.

58. The Commission obeyed and issued the following delegated regulation that established the labeling as requested in the basic act:

5.12.2019 EN Official Journal of the European Union L 315/155

COMMISSION DELEGATED REGULATION (EU) 2019/2018

of 11 March 2019

supplementing Regulation (EU) 2017/1369 of the European Parliament and of the Council with regard to energy labelling of refrigerating appliances with a direct sales function

59. Please note how the mechanism works: a previous basic act that foresees a delegation of power in favor of the Commission, and then the Commission issues the subsequent delegated act in pursuance of the duty assigned in the delegation. Note that the basic act is a legislative act (in this case, it was adopted according to the ordinary legislative procedure), and the delegated act is a regulatory act (a non-legislative act).

60. *In principle, only the Commission may adopt delegated acts*. In practice though, an EU agency can have a great influence in the definition of the content of a delegated act because in certain fields the Commission is strongly influenced by the expertise and advice of EU agencies. When drafting certain delegated acts the Commission will be exposed to the risk of merely accepting and adopting the content proposed by an EU agency. This could entail conferring the power to draft delegated acts to EU agencies, something that contradicts the TFEU.

2.2.2 Implementing acts of article 291 TFEU

61. An implementing act can be material legislation or a resolution. The mission of an implementing act is different from the one of a delegated act. Implementing acts *purely execute, give effect to a previous legislative act (a basic act) without amending or supplementing such basic act*.

62. The Commission and, in very specific cases the Council, will adopt implementing acts where uniform conditions for implementing an EU legislative act are necessary. When uniform conditions for implementing EU legislative acts are not necessary, Member States, not the Commission, will implement EU legislative acts.

63. The number of cases in which the Council adopts implementing acts is few and too specific as to be considered here. An example of an implementing act of the Council is the adoption of restrictive CFSP on individuals. We continue only in regards to Commission implementing acts.

64. Implementing acts are adopted by the Commission *only if they cannot be adopted by Member States because the implementing act has to apply in all the EU*. This rule is familiar because it is inspired by a principle we mentioned in Lesson 3: *the general EU law principle of subsidiarity*. For this reason, we affirm that the rule of article 291 TFEU establishes *executive subsidiarity*. In essence, article 291 TFEU is requiring that in the realm of executive action the Commission only intervenes if it is necessary because Member States cannot do so.

Let us read an example:

L 83/34 EN Official Journal of the European Union 27.3.2015

REGULATION (EU) 2015/479 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 11 March 2015

PROTECTIVE MEASURES

Article 5

1. In order to prevent a critical situation from arising on account of a shortage of essential products, or to remedy such a situation, and where Union interests call for immediate intervention, the Commission, acting at the request of a Member State or on its own initiative, and taking account of the nature of the products and of the other particular features of the transactions in question, may make the export of a product subject to the production of an export authorisation, the granting of which shall be governed by such provisions and subject to such limits as the Commission shall lay down in accordance with the examination procedure referred to in Article 3(2), or, in cases of urgency, in accordance with Article 3(3).

65. You can see that Regulation (EU) 2015/479 is a legislative regulation on common rules for exports that, in order to prevent shortages of essential products in the EU, allows the Commission to subject exports of essential products out of the EU to individual export authorizations so that there is tight control on the flow of that type of products. If the Commission decides to control the exports of a specific product, it has to do so by issuing an implementing act. That is stated in the following extract of article 5.1: "(...) an export authorisation, the granting of which shall be governed by

such provisions and subject to such limits as the Commission shall lay down in accordance with the examination procedure (...)".

66. At the beginning of the COVID-19 crisis, the Commission took advantage of article 5 and conditioned the exports out of the EU of personal protective equipment (gloves, mouth-nose protective equipment…, etc.) to an individualized Commission authorization. The Commission did so with Implementing Regulation (EU) 2020/402, adopted on 14 March 2020. Please read the extracts below:

15.3.2020 EN Official Journal of the European Union L 77 I/1

(Non-legislative acts)

COMMISSION IMPLEMENTING REGULATION (EU) 2020/402

of 14 March 2020

making the exportation of certain products subject to the production of an export authorisation

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2015/479 of the European Parliament and of the Council of 11 March 2015 on common rules for exports ([1]), and in particular Article 5 thereof,

Whereas:

(1) Since the outbreak of the epidemiological crisis caused by the coronavirus SARS-CoV-2, the disease associated with it, the COVID-19, has been spreading fast across the world, reaching also the Union's territory. According to the European Centre for Disease Prevention and Control, the risk associated with COVID-19 infections for people in the Union is currently considered to be moderate to high, based on the probability of transmission and the impact of the disease. The virus spreads rapidly within the Union, and might have an enormous public health impact with substantial fatal outcomes in high-risk groups and significant economic and societal disruption.

(2) In this context, the need for personal protective equipment, as detailed in Annex 1, has already increased significantly. Given its nature and the prevailing circumstances, such type of equipment is an essential product since it is necessary to prevent the further spreading of the disease, and safeguard the health of medical staff treating infected patients.

Article 1

Export authorisation

1. An export authorisation established in accordance with the form set out in Annex II shall be required for the export outside the Union of personal protective equipment listed in Annex I, whether or not originating in the Union. Such authorisation shall be granted by the competent authorities of the Member State where the exporter is established and shall be issued in writing or by electronic means.

2. Without the production of such export authorisation, the exportation is prohibited.

ANNEX I

Protective Equipment

The equipment listed in this Annex is in conformity with the provisions of Regulation (EU) 2016/425 [1].

Category	Description	CN Codes
Protective spectacles and visors	— Protection against potentially infectious material, — Encircling the eyes and surroundings, — Compatible with different models of filtering face-piece (FFP) masks and facial masks, — Transparent lens, — Reusable (can be cleaned and disinfected) or single-use items	ex 9004 90 10 ex 9004 90 90
Face shields	— Equipment for the protection of the facial area and associated mucous membranes (ex: eyes, nose, mouth) against potentially infectious material, — Includes a visor of transparent material, — Usually includes fixations to secure over the face (e.g.: bands, temples) — Can include a mouth-nose protection equipment as described below, — Reusable (can be cleaned and disinfected) or disposable	ex 3926 90 97 ex 9020 00 00
Mouth-nose-protection equipment	— Masks for the protection of the wearer against potentially infectious material and for the protection of the environment against potentially infectious material spread by the wearer, — Can include a face shield as described above, — Whether or not equipped with a replaceable filter	ex 6307 90 98 ex 9020 00 00
Protective garments	Garment (e.g. gown, suit) for the protection of the wearer against potentially infectious material and for the protection of the environment against potentially infectious material spread by the wearer	ex 3926 20 00 ex 4015 90 00 ex 6113 00 ex 6114 ex 6210 10 10 6210 10 92 ex 6210 10 98 ex 6210 20 00 ex 6210 30 00 ex 6210 40 00 ex 6210 50 00 ex 6211 32 10 ex 6211 32 90 ex 6211 33 10 ex 6211 33 90 ex 6211 39 00 ex 6211 42 10 ex 6211 42 90 ex 6211 43 10 ex 6211 43 90 ex 6211 49 00 ex 9020 00 00

[1] Regulation (EU) 2016/425 of the European Parliament and of the Council of 9 March 2016 on personal protective equipment and repealing Council Directive 89/686/EEC (OJ L 81, 31.3.2016, p. 51).

67. Regulation (EU) 2015/479 is the basic act and Regulation (EU) 2020/402 is the implementing act. The implementing regulation *executes, gives effect to article 5 of the basic act but does not modify it at all*. The Commission and not Member States adopted the implementing act because uniform rules for all the EU are required.

2.2.3 The distinction between delegated and implementing acts

68. The main difference between delegated and implementing acts is that *delegated acts supplement the non-essential elements of a basic act, while implementing acts merely execute, give effect, to a basic act. Delegated acts add content to the basic act and implementing acts do not.*

69. This distinction is not as clear as it may appear because in certain cases one could argue that implementing acts somehow also add something to basic acts. The scholarship has noticed this difficulty to differentiate implementing from delegated acts. Advocate General P. Cruz Villalón warned in his conclusions on the case *Commission v. Parliament and Council*[8] that the CJEU still needs to develop and explain better how to do so. Until a clearer criterion is provided, there is no straight answer to this issue.

2.2.4 Control of delegated and implementing acts

2.2.4.1 Judicial control

70. One mechanism to make sure that the Commission respects the limits that articles 290 and 291 TFEU set for delegated and implementing acts is judicial. The CJEU has always the power to control that these rules are respected by the Commission.

2.2.4.2 Political control

71. In addition to the judicial control of the CJEU, there exist political safeguards that avoid that the Commission exceeds its powers when dictating delegated and implementing acts.

Prior, however, the following has to be underlined:

72. If the Commission issues a delegated act that breaches the limits of the delegation by way of, for instance, establishing new rules on the essential elements of the basic act, then the *Commission is breaking the constitutional balance of the EU because it is taking away the power that corresponds to the legislator (European Parliament and Council). The legislator is the only one that can legislate the essential elements of a basic act (article 290 TFEU).*

73. But –this is an important difference–, if the Commission issues an implementing act that breaches the limits of article 291 TFEU by way of, for instance, issuing common implementing rules for all the EU in a case in which Member States could have done

[8] Reference C-427/12.

so, then the Commission *is breaking the constitutional balance of the EU because it is taking away the power that corresponds to the Member States. Member States are the ones that, in principle, have to implement EU law (article 291 TFEU).*

74. There is a difference. When the Commission trespasses the limits of delegated acts it is assuming a different type of power to the type of power that it is assuming when it trespasses the limits of implementing acts. In the first case, the Commission threatens the power of the EU legislator (the EP and the Council), while in the second it threatens the powers of Member States.

75. For this reason, the entity in charge of controlling compliance with the limits of delegated acts is the EU legislator, and the ones in charge of controlling compliance with the limits of implementing acts are Member States.

76. The legislator controls the limits of delegated acts using the conditions that article 290 TFEU establishes (explained in Section 2.2.1 above). Member States control the limits implementing acts in the so-called *new comitology* procedure of Regulation 182/2011. The term *new* indicates that it is an updated version established by the Lisbon Treaty. *Comitology* indicates that Member States control the adoption of implementing acts in committees of representatives of Member States chaired by the Commission.

77. In comitology, the committees review the draft of an implementing act drafted by the Commission before the act is adopted. The committee analyzes the draft and expresses a positive or a negative opinion on it. This happens in the *examination procedure* and the *advisory procedure*.

Examination procedure

78. *Implementing acts that are material legislation are always considered in the examination procedure*. Other implementing acts that are not material legislation but are of a certain relevance are also the object of this procedure[9]. In the examination procedure, if the committee rejects the draft proposed by the Commission, then the Commission cannot adopt the implementing act. In this case, the Commission can try a second time and present the draft before an appeal committee that is also integrated by Member States. If the appeal committee rejects the proposal of the Commission, then the act cannot be adopted (article 6.3 of Regulation 182/2011). If the committee approves the proposal or the appeal committee approves the proposal, then the Commission can adopt the implementing act (articles 5.2 and 6.3 of Regulation 182/2011).

79. In case that in the examination procedure the committee does not deliver an opinion on the draft implementing act, the Commission may adopt the implementing act based on the draft except, (i) in case the draft foresees that the act cannot be adopted without the positive opinion of the committee, or (ii) except in the cases listed in article 5.4 (a) of Regulation 182/2011.

[9]The detailed list of the acts that are not material legislation that are the object of the examination procedure are in article 2 of Regulation 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

Advisory procedure

80. In the advisory procedure, legal acts that are not material legislation and are of less relevance are considered. In this procedure, the Commission presents to the committee a draft of the implementing act that it wants to adopt. In case that the committee rejects the draft, the Commission has to take the utmost account of the conclusions and opinion of the committee, but it can decide to do otherwise and adopt the act even with the negative opinion of the committee (article 4 of Regulation 182/2011). The Commission can also adopt the implementing act if the committee does not issue an opinion on the draft.

LESSON 6 – JUDICIAL CONTROL OF EU LAW

Content

I. THE ARCHITECTURE OF THE JUDICIAL CONTROL OF EU LAW

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1. We have studied the activity of the legislative and the executive of the EU, it is time to continue with the judiciary.

2. The judiciary is the third power of a political entity. It is integrated by judges. They make sure that the legislative, the executive, and private parties respect the law by interpreting and applying its rules. That is also the case in the EU. The judiciary of the EU makes sure that the legislative and executive of the EU, as well as private parties, respect EU law by interpreting and applying its rules.

I. The architecture of the judicial control of EU law

1. Introduction

Let us start by analyzing the structure of the judicial activity of the EU.

3. First. The fundamental principle of the organization of the EU judiciary is that *both the CJEU and national courts are part of it. Both cooperate in the task of interpreting and applying EU law.*

4. Second. Cooperation between the CJEU and national courts does not shadow the fact that *the institution with the last word in the interpretation of EU law is the CJEU*. This is important. The CJEU is the highest authority in the interpretation of EU law. In the CJEU, the Court of Justice and not the General Court holds the highest position (the difference between the Court of Justice and the General Court was explained in Lesson 2).

5. The CJEU links its own authority to the description of EU law as an autonomous legal order (see Section II 1 of Lesson 4). The CJEU considers that a manifestation of the autonomy of EU law is that the CJEU is its highest judicial institution. According to the view of the CJEU, this implies that its activity cannot be interfered with by any other judicial institution when it comes to interpreting EU law.

2. A decentralized judiciary of the EU

6. In the judiciary of the EU, *not every matter in which EU law is relevant is directly solved by the CJEU*. Courts of Member States also solve cases of EU law under the watch of the CJEU. Academic literature describes this as a system of *decentralized judicial control of EU law*. The term decentralized means that it is not just the CJEU at the EU (central) level that solves cases of EU law, but also national courts at a national (peripheral) level do so in cooperation with the CJEU. In fact, *the courts of Member States solve the majority of disputes involving EU law*.

   The question is then: When does the CJEU intervene directly, and when do courts of Member States intervene? How does the CJEU watch the activity of national courts when they apply EU law?

2.1 Cases in which the CJEU acts directly

7. The CJEU directly solves cases *affecting EU institutions*. For instance, the CJEU directly controls the legality of the acts of the Commission, the Council, and the European Parliament. This type of judicial control corresponds to the right half of the diagram at the end of this section.

8. In this mode of control the CJEU uses the actions (formal channels) listed on the right side of the diagram at the end of this section. The most important are the first three: (i) the annulment action of article 263 TFEU, (ii) the failure-to-act action of article 265 TFEU, and, (iii) the damages action of articles 268 and 340 TFEU. The annulment action is, perhaps, the most important of the three.

9. The CJEU also acts directly by solving cases in which the Commission or a Member State wants to react judicially against an infringement of EU law committed by a Member State. For instance, if Sweden thinks that the Republic of France violated EU law, then Sweden can bring an action against France before the CJEU. In this case, the Commission would also be entitled to bring that action against France before the CJEU. This is done through the declaration of failure to fulfill obligations, or infringement action, of articles 258-260 TFEU (left half of the diagram at the end of this section).

2.2 Cases in which the courts of Member States act under the watch of the CJEU

10. As stated above, the courts of Member States solve the majority of conflicts involving EU law. For instance, Spanish courts oversee the implementation of EU law in Spain. If a regional government (for instance, the Gobierno Foral de Navarra) or a town council of Spain (for instance, the Ayuntamiento de Sevilla) incorrectly applies a rule of EU law and that gives rise to a legal dispute, Spanish courts will declare the incorrect application of that EU law rule. If two private parties have a dispute in Spain and in that dispute a rule of EU law needs to be applied to solve it, Spanish courts will apply it.

What role does the CJEU play in these cases?

11. Occasionally national courts have doubts concerning the EU law they have to apply to a conflict. In that situation, the CJEU is the one that clarifies EU law to national courts. The CJEU helps them. The doubts of the national court may be (i) on the interpretation of EU Treaties and other legal acts of the EU, or (ii) on the validity of legal acts of the EU. An example of (i) is the case in which the Spanish Tribunal Supremo doubted whether an elected member of the European Parliament enjoyed personal immunity according to EU law[1]. An example of (ii) is the case in which the High Court of Justice of England and Wales was not sure about the validity of a number of EU regulations and decisions on fishing[2] on the coast of the Western Sahara because the possibility existed that they contradicted EU primary law[3].

[1] The Tribunal Supremo doubted on the interpretation of article 9 of the Protocol number 7 to the TEU and TFEU on the privileges and immunities of the EU. This was the question in the preliminary reference procedure of case *Junqueras i Vies*, reference C-502/19.

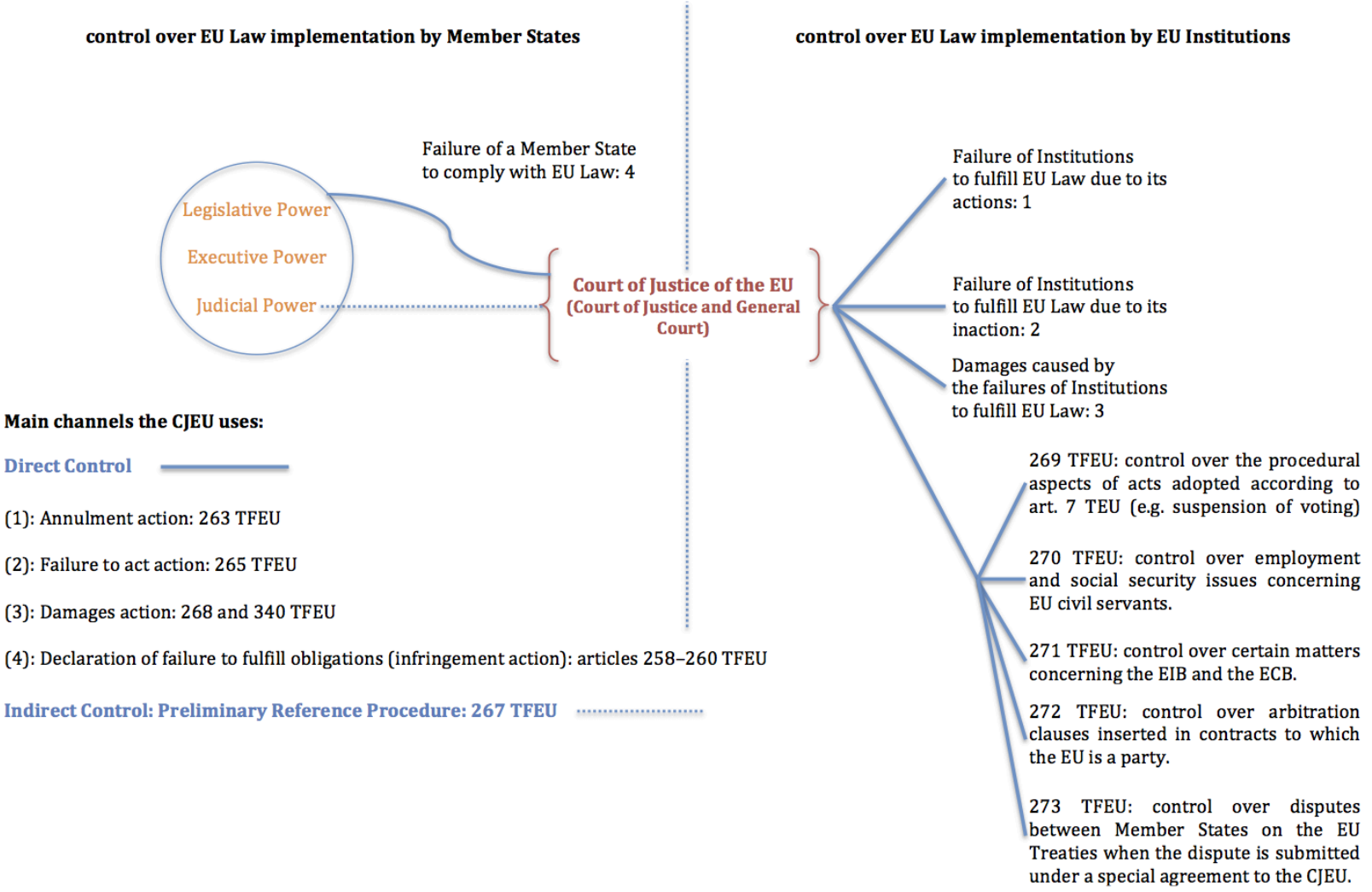
[2] The High Court of Justice of England and Wales doubted on the legality of Council Regulation (EC) 764/2006, Council Decision 2013/785/EU, and Council Regulation (EU) 1270/2013.

[3] This was the question in the preliminary reference procedure of case *Western Sahara Campaign UK*, reference C-266/16.

12. In these examples, the CJEU *indirectly controls* the application of EU law because it has the authority to indicate to national courts what the correct interpretation of EU law is. National courts have the authority and power to solve the dispute but the CJEU has the authority to state what is the sense and validity of the EU law that will be applied by the national court.

13. The CJEU does this through the preliminary reference procedure of article 267 TFEU. This procedure corresponds to the discontinuous line of the left half of the diagram below.

EU judicial architecture for the revision of every case concerning EU Law


control over EU Law implementation by Member States
control over EU Law implementation by EU Institutions
Failure of a Member State to comply with EU Law: 4
Legislative Power
Executive Power
Judicial Power
Court of Justice of the EU (Court of Justice and General Court)
Failure of Institutions to fulfill EU Law due to its actions: 1
Failure of Institutions to fulfill EU Law due to its inaction: 2
Damages caused by the failures of Institutions to fulfill EU Law: 3
269 TFEU: control over the procedural aspects of acts adopted according to art. 7 TEU (e.g. suspension of voting)
270 TFEU: control over employment and social security issues concerning EU civil servants.
271 TFEU: control over certain matters concerning the EIB and the ECB.
272 TFEU: control over arbitration clauses inserted in contracts to which the EU is a party.
273 TFEU: control over disputes between Member States on the EU Treaties when the dispute is submitted under a special agreement to the CJEU.

Main channels the CJEU uses:

Direct Control

(1): Annulment action: 263 TFEU

(2): Failure to act action: 265 TFEU

(3): Damages action: 268 and 340 TFEU

(4): Declaration of failure to fulfill obligations (infringement action): articles 258–260 TFEU

Indirect Control: Preliminary Reference Procedure: 267 TFEU

II. THE ACTIVITY OF THE JUDICIARY OF THE EU

14. The activity of the judiciary of the EU is analyzed by looking into the different actions or formal channels that courts of the judiciary of the EU use. These actions are –mainly– the ones listed in the diagram of the page before this one. We will explain two: (i) the preliminary reference procedure (Section II 1), and (ii) the annulment action (Section II 2).

1. The preliminary reference procedure

1.1 Introduction

15. This procedure is critical to assure a uniform interpretation and application of EU law across the EU. The preliminary reference procedure is a fundamental piece in the legal architecture of the EU.

16. Such is the success and importance of this procedure that we tend to assume that EU law created it, but the fact is that in international law very similar mechanisms existed before the preliminary reference procedure was introduced in article 41 of the 1951 Treaty Establishing the Coal and Steel Community.

1.2 The logic of the procedure

17. A way to describe the preliminary reference mechanism is to portray it as a question-answer type of interaction in which national judges ask their doubts on EU law before they apply it to a case and the CJEU answers them so that the national judge is in a position to solve it. This question-answer mechanism is very useful to make sure that EU law is interpreted uniformly throughout the Union because, when answering, the CJEU is providing a binding interpretation that applies in all the EU.

18. In the procedure, a national court raises to its discretion a question to the CJEU on the interpretation of EU law, or on the validity and interpretation of acts of EU institutions and agencies. The question is called a preliminary reference. In reply to its question, the national court receives a *binding* answer in a judgment. The answer is called a preliminary ruling. The national court has to raise this question in the context of a real[4] legal dispute involving EU law that the national court has the responsibility to solve.

19. The term "acts of EU institutions and agencies" used in the preceding paragraph must be understood as any act of the EU that the national court needs to take into consideration to solve the case.

20. Because preliminary rulings of the CJEU are binding for every national judge, they are a fundamental tool to control how national judges interpret EU law in the national sphere. This control is indirect because *the CJEU merely answers the doubts of national judges while national judges are the ones that directly solve the cases in their national sphere.*

[4] This was stated by the CJEU in the cases *Foglia v. Novello* and *Foglia v. Novello (2)*, references 104/79 and 244/80, respectively.

1.3 National courts entitled to raise the preliminary reference

21. Article 267 expressly states that "(...) any court or tribunal of a Member State (...)" can raise a preliminary reference.

22. The question is, what is then considered a court or tribunal in this context? The answer is not so obvious because there are special bodies in Member States that are not part of the judiciary but can carry out a function that is almost identical to the function that a court of the judiciary carries out. In Spain, this happens with some bodies of the Administration like, for instance, the so-called tax tribunals[5], or the public procurement tribunals[6]. Can these administrative bodies raise a preliminary reference?

23. The Court of Justice answered. A court that raises a preliminary reference before the CJEU has to fulfill *all* of the following characteristics: it has to be a body, (i) created by the law, (ii) permanent, (iii) holding compulsory jurisdiction, which means that the affected parties cannot choose to solve their dispute before a different court, (iv) that decides on the grounds of a procedure in which the parties involved can participate in order to defend their interests (this is called an *inter-partes* procedure), (v) that applies the rule of law in its decisions, and (vi) that is able to rule independently. The Court of Justice has applied these requirements in several cases; for instance, in the case *Vaasen-Göbbels*[7].

24. The CJEU considers that the Spanish tax tribunals and the Spanish public procurement tribunals are courts that can raise a preliminary reference.

1.4 When does the national court raise a preliminary reference?

25. According to article 267 TFEU, national courts have the discretion –the freedom– to submit a preliminary reference to the CJEU when they deem it necessary to judge. Please read this extract of article 267 TFEU:

C 326/164 EN Official Journal of the European Union 26.10.2012

Article 267
(ex Article 234 TEC)

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

26. The CJEU has added to the wording of article 267 TFEU, that if the national court needs to know whether an EU act is valid in order to decide a case, then the national

[5] *Tribunales económico administrativos.*
[6] *Tribunales administrativos de contratación pública.*
[7] Reference 61/65.

court *must* raise the question to the CJEU. This was stated in the case *IATA*[8] and is grounded on previous judgments of the CJEU that declared that national courts do not have the jurisdiction (the power) to declare that an EU act is invalid. Please see the case *Fotofrost*[9].

27. Additionally, there is a second case in which a national court *must* raise the preliminary reference. Please read this extract of article 267 TFEU:

C 326/164 EN Official Journal of the European Union 26.10.2012

Article 267
(ex Article 234 TEC)

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

28. Article 267 TFEU is ordering the following: in case that the national court solving the case is a court against whose decision there is no opportunity to appeal, then that court *must raise* the preliminary reference to the CJEU if it needs assistance to interpret an act of EU law. The Court of Justice opted for this reading of article 267 TFEU in the case *Costa Enel*[10].

1.5 When can a national court avoid raising the preliminary reference? (the *acte clair* doctrine)

29. There are questions on the interpretation or validity of EU law that are already answered in a previous preliminary ruling. In that case, it is not reasonable to demand that the national court formulates the question again.

30. The Court of Justice explained that, under certain circumstances, a national court can avoid raising a preliminary reference. Specifically:

- A national court does not need to ask a question that is identical to one that the Court of Justice already answered. Please see the case *Da Costa*[11].

- A national court does not need to ask about the validity or invalidity of an EU act if the Court of Justice declared it illegal. Please see the case *International Chemical Corporation*[12].

[8] Reference C-344/04.
[9] Reference 314/85.
[10] Reference 6/64.
[11] Reference 28-30/62.
[12] Reference 66/80.

- A national court does not need to ask the CJEU on the interpretation of EU law if the CJEU already gave such an obvious answer that leaves no space for reasonable doubt. The answer has to be obvious to national courts and to the Court of Justice alike. Please see the case *CILFIT*[13].

1.6 Which court of the CJEU issues the preliminary ruling?

31. We answered this question in Lesson 2. As of today, only the Court of Justice answers preliminary references.

32. Article 256.3 TFEU provides that the General Court shall have jurisdiction to issue preliminary rulings in specific areas laid down by the Statute of the CJEU, but the Statute of the CJEU has not laid down those specific areas and, therefore, it is understood that only the Court of Justice has the competence to issue preliminary rulings.

1.7 Limits of the jurisdiction of the CJEU

33. When answering a preliminary reference, the CJEU,

- does not have the power to interpret national law. Please see the case *Hoekstra*[14] and;

- in principle, does not have the power to interpret the legality of an act carried out by national authorities. Please see the case *Borelli*[15].

1.8 The procedure

34. The detailed rules on the mechanics of the preliminary ruling procedure are in the Statute of the CJEU and in the Rules of Procedure of the Court of Justice. Another useful document is "The Recommendations of the CJEU to national courts in relation to the initiation of the preliminary ruling proceedings".

35. The law of Member States can foresee how national judges should proceed when raising a preliminary reference. For instance, in Spain, article 4 bis of the Organic Law of the Judiciary (Ley orgánica del Poder Judicial) indicates that Spanish courts will have to hear both parties of a dispute before they raise a preliminary reference to the CJEU. It also indicates that Spanish courts wanting to raise a preliminary reference in the middle of proceedings need to do so under the form of a judicial decision (*auto*).

36. The national court shall raise the preliminary reference at a stage of the national procedure in which all the important facts and the points of the law that are discussed have been defined. Before raising the preliminary reference, the national court has to, (i) hear the position of the parties of the case, and (ii) suspend the national proceedings until the Court of Justice issues the preliminary ruling.

37. The text of the preliminary reference should include the content listed in article 94 of the Rules of Procedure of the Court of Justice. The text needs to be drafted clearly,

[13] Reference 283/81.
[14] Reference 75/63.
[15] Reference C-97/91.

simply, and precisely. It has to omit superficial content. The CJEU considers that about 10 pages are sufficient in most cases. The preliminary reference can be sent electronically or by post.

38. Before answering the Court of Justice will receive submissions from all the parties to the case. It will also hear the parties in the oral phase of the procedure. If the Court of Justice thinks that the oral phase, nor written submissions, are necessary, they can be omitted.

39. After submissions and after the oral phase, the Court of Justice will receive the conclusions of the Advocate General. The Court will after issue the judgment containing the preliminary ruling. Upon reception of the preliminary ruling, the national court will solve the dispute and revert the Court of Justice about the final decision.

1.9 The expedited procedure

40. In situations in which the preliminary ruling of the Court of Justice may help to avoid a serious and immediate danger to public health or to the environment, or if the circumstances require that the preliminary ruling be issued in a very short time, the preliminary procedure is processed under a so-called *expedited procedure*. The person deciding if the preliminary reference is processed through the expedited procedure is the President of the Court of Justice (article 105 of the Rules of Procedure of the Court of Justice).

1.10 The urgency procedure

41. Only in matters under Title V of Part Three of the TFEU (that is, Area of Freedom, Security, and Justice), when the preliminary ruling needs to be issued even more quickly than in an expedited procedure, the preliminary procedure is processed in the *urgency procedure*. This is understood to be the case, for instance, when the content of the preliminary ruling affects the legal situation of a person deprived of liberty, or when it affects the situation of young children and a delay in the answer can affect the relationship of those children with their parents, or their development and integration in their family or environment.

42. In this case, the chamber of the Court of Justice in charge of the preliminary reference (remember what a chamber is in Lesson 2) takes the decision on whether the preliminary reference is to be processed through the urgency procedure or not (article 108 of the Rules of Procedure of the Court of Justice).

1.11 An example

The following case can help us understand how the preliminary reference procedure works. It is not a real example but is pedagogic.

43. The European manufacturer of goggles UVEX wanted to export out of the EU protective goggles to different diplomatic delegations of EU Member States scattered in countries of America, Asia, and Africa so as to provide diplomatic staff with personal protective equipment against the COVID-19. UVEX knew that, according to article 1 of Commission Implementing Regulation (EU) 2020/402, all exports of

protective goggles outside the EU are subject to a previous authorization that the Member State in which the exporter is established has to issue.

L 77 I/2 EN Official Journal of the European Union 15.3.2020

Article 1

Export authorisation

1. An export authorisation established in accordance with the form set out in Annex II shall be required for the export outside the Union of personal protective equipment listed in Annex I, whether or not originating in the Union. Such authorisation shall be granted by the competent authorities of the Member State where the exporter is established and shall be issued in writing or by electronic means.

2. Without the production of such export authorisation, the exportation is prohibited.

44. If there is no previous authorization, there is no export. Since UVEX is based in the city of Fürth, the authorities that had to issue the authorization before the goggles could be put in a cargo plane were the German.

45. UVEX requested an export authorization before the German customs authorities to export 1,500 goggles to Buenos Aires. The authorities denied the authorization and the goggles could not be exported. UVEX challenged the denial of the authorization before the court of the city of Ansbach. This court was the national court that had to solve the dispute between UVEX and the German customs authorities and is part of the judiciary of the Federal Republic of Germany. When solving the case, the Court of Ansbach analyzed the arguments of UVEX and the German customs authorities.

46. The argument of the German customs authorities was that, according to article 1 of the Regulation 2020/402, Member States enjoy the freedom to decide whether to grant or deny export authorizations of personal protective equipment, including protective goggles such as the ones that UVEX wanted to export. There is no reason that obliges customs authorities to grant the authorization and, therefore, UVEX did not have a right to export protective goggles. For the customs authorities, the denial of authorization was legal.

47. The argument of UVEX was that article 2.3 of the same regulation includes a list of cases in which customs authorities *must* provide an export authorization. The list of article 2.3 includes exports for the "supply of EU and Member State delegations abroad". UVEX understood that the export authorization they were requesting fell under this case and, therefore, the customs authorities were obliged to authorize the export of goggles. For UVEX the denial of the export authorization by the customs authorities dis not comply with article 2.3 of the regulation.

According to article 2.3:

> 3. In deciding whether to grant an export authorisation under this Regulation, Member States shall take into account all relevant considerations including, where appropriate, whether the export serves, inter alia:
>
> — to fulfil supply obligations under a joint procurement procedure in accordance with Article 5 of Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health (2);
>
> — to support concerted support actions coordinated by the Integrated Political Crisis Response Mechanism (IPCR), the European Commission or other Union institutions;
>
> — to respond to the requests of assistance addressed to and handled by the UPCM (Union Civil Protection Mechanism), by third countries or international organisations;
>
> — to support the statutory activities of support companies abroad that enjoy protection under the Geneva Convention, and in so far as they do not impair the ability to work as a national support company;
>
> — to support the activities of the World Health Organisation's (WHO) Global Outbreak Alert & Response Network (GOARN);
>
> — to supply foreign operations of EU Member States including, military operations, international police missions and/or civilian international peacekeeping missions;
>
> — for the supply of EU and Member State delegations abroad.

48. The Court of Ansbach considered that article 2.3 can be interpreted in two contradictory ways. The article seems to include a list of cases in which Member States *may* issue an export authorization only *if they wish* and, therefore, the customs authorities have it right. But at the same time, it is true that the list of article 2.3 can also be interpreted as a list of cases in which Member States *have to authorize* exports if no exceptional circumstance occurs.

49. Therefore, the Court of Ansbach found itself in a situation in which it needed to know what the correct interpretation of article 2.3 was. In this situation, the Court of Ansbach raised a preliminary reference to the Court of Justice.

Let us analyze the example.

50. The national court (the Court of Ansbach) had to solve a dispute between the private party UVEX and the German customs authorities. UVEX demanded that the denial of export authorization was declared illegal and reversed so that the goggles could be exported to Buenos Aires. The preliminary reference was, therefore, based on a real dispute and not just on an abstract question.

51. There is no doubt that the Court of Ansbach is a court that can pose a preliminary reference because it is part of the German judiciary (please see Section 1.4 above).

52. When solving the dispute, the national court found that the interpretation of a rule contained in an implementing decision was not clear. This is precisely the purpose of the preliminary reference procedure: to clarify the interpretation of EU law (also to clarify the validity of an EU act).

53. In this example, we can assume that the question that the Court of Ansbach posed had not been answered before. Therefore, the *acte clair* doctrine did not come into play (please see Section 1.5 above).

54. The preliminary reference was to be answered by the Court of Justice and not by the General Court (please see Section 1.6 above).

55. The preliminary reference had to be processed through the procedure explained in Section 1.8 above. We can think that in this case this was done through the expedited version of the procedure because the health of the recipients of the goggles depended on the speed of the answer of the Court. It was not to be processed through the urgency version because this case does not fall under the scope of Title V of Part Three of the TFEU. The President of the Court of Justice was the person to take the decision on whether the expedited procedure applies or not.

56. The moment the Court of Ansbach received the preliminary ruling, it was in the position to end the dispute between the parties of the example and then inform the Court of Justice on the solution. Please, do not forget that the interpretation coming from the Court of Justice is binding and, therefore, the Court of Ansbach had to follow the interpretation of the Court of Justice when adjudicating.

2. The annulment action

2.1 Introduction

57. A fundamental, non-disposable, trait of a political entity inspired by the rule of law is that it can be challenged by citizens before the judiciary. If this possibility does not exist, then that entity does not abide by the rule of law.

58. This is, precisely, the purpose of the annulment action of article 263 TFEU. It is a channel to contest judicially illegal acts of the EU. We shall analyze, (i) the object of an annulment action, (ii) who is entitled to bring an annulment action, (iii) what are the reasons that can ground an annulment action, and (iv) when shall the annulment action be brought.

59. This action is influenced by the special constitutional design of the judiciary of the EU. If you recall, the judiciary of the EU operates as a decentralized system. This circumstance dictates that only a reduced number of privileged applicants can appear with no restriction before the centerpiece of the system (the CJEU) to demand that the legality of an act of the EU be reviewed. The rest shall appear before the branches of the system (national courts).

60. Hence, the so-called *non-privileged actors* can only appear before the CJEU to bring an annulment action when they satisfy certain requirements. These requirements are quite demanding to avoid overloading the CJEU. As a rule, non-privileged actors have to question the legality of acts of the EU before national courts by an alternative means to an annulment action. As indicated, most of the non-privileged actors wanting to question the legality of an act of the EU are diverted to the branches of the EU judiciary (national courts). This way the center (the CJEU) assumes only a limited amount of work, while the branches assume the larger rest.

2.2 The object

61. An annulment action reviews the legal acts of the European Parliament, the Council, the Commission, the European Council, and the ECB. It also reviews the legal acts of EU agencies, and other EU bodies and offices.

62. In this context, the term "legal act" has to be understood more restrictively than in Lesson 4. Legal acts that can be the object of the annulment action have to effectively cause an impact in the legal sphere of a natural or legal person[16]. They have to affect their rights and obligations.

63. Examples of legal acts that can be challenged in an annulment action are a decision from the Commission imposing a sanction, a piece of material legislation adopted by the Commission, or a certification from the Commission stating that an individual holds the right to work in a Member State. Examples of acts that cannot be challenged in an annulment action are, for instance, a notification issued by an EU agency in which information is asked from someone or a report of the Commission that brings no consequence whatsoever, like an informative report on the state of rail transport in Europe. If you analyze the examples you will see that the challengeable acts cause an impact on the rights and obligations of someone and non-challengeable acts do not.

64. Recommendations and opinions of article 288 TFEU are non-binding and cannot be challenged in an annulment action because they cannot affect the rights and obligations of no one.

65. You also need to know that an annulment action *cannot* review the legality of acts adopted by the EU in the Common Foreign and Security Policy (CFSP), except for restrictive measures adopted against natural or legal persons (sanctions). This is established in article 275 TFEU.

66. Similarly, the CJEU cannot review either the validity or proportionality of operations of the police or law-enforcement authorities of Member States carried out in the scope of Title V of Part Three of the TFEU (Area of Freedom, Security, and Justice) in view of maintaining law and order. This is established in article 276 TFEU.

67. Please take into account that in no case can the CJEU review the legality of acts of Member States in an annulment action. They are out of the scope of the power of the CJEU.

2.3 Entitled subjects

2.3.1 Legal standing of privileged and semi-privileged applicants

68. Member States, the European Parliament, the Council, and the Commission can always bring an annulment action before the CJEU. They are the *privileged* applicants of the annulment action. Member States and these EU institutions enjoy this privilege because it is considered that they are always affected by the action of EU institutions and that, hence, they should be given the opportunity to react always.

69. The Court of Auditors, the ECB, and the Committee of the Regions can raise an annulment action only when their prerogatives are affected. They are the *semi-privileged* applicants of the annulment action because they can raise the action only when their powers are threatened. For instance, the Committee of the Regions can bring an annulment action against a legislative act on the field of transport adopted by the European Parliament and the Council if these institutions did not ask the Committee

[16] Please review what natural and legal persons are in Section I 1 of Lesson 4.

to give its opinion on the issue because in this specific field article 91 TFEU establishes that the European Parliament and the Council must ask for the opinion of the Committee of the Regions before adopting a legislative act. In other cases, this committee cannot raise an annulment action.

70. Natural persons (for instance, you) and legal persons (for instance, a company, a university, an association) can raise an annulment action only in certain cases. They are –we are– the *non-privileged* applicants of the annulment action.

71. To express the fact that an applicant enjoys the legal recognition to raise or bring an annulment action we use the expression to *have legal standing*. We state "this or that applicant has legal standing in an annulment action".

2.3.2 Legal standing of non-privileged applicants

2.3.2.1 As nominal addressees

72. Natural and legal persons have legal standing against legal acts of the EU of which they are nominal addressees. For instance, if the Commission issues a decision imposing a fine to the manufacturers of music electronics Asus, Denon & Marantz, Philips, and Pioneer for agreeing on a minimum retail sale price on the internet, each of those four companies has legal standing to challenge the Commission decision through an annulment action.

2.3.2.2 As non-nominal addressees

73. Natural and legal persons have also legal standing against an act of the EU that, despite not being nominally addressed to them, *is of direct and individual concern to them*.

74. The question is, when is a legal act of direct concern?; and, when is a legal act of individual concern? The criteria that the CJEU follows have a history of their own.

Direct concern

75. The CJEU understands that a legal act is of direct concern to a person when that act affects the legal situation (rights and obligations) of that person *with no need for further national or EU legal acts*. Would you say that the following article is of direct concern to non-indigenous seal hunters that want to place their game[17] in the internal market of the EU?

L 286/36 EN Official Journal of the European Union 31.10.2009

REGULATION (EC) No 1007/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 16 September 2009
on trade in seal products

Article 3

Conditions for placing on the market

1. The placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence. These conditions shall apply at the time or point of import for imported products.

[17] *Presas.*

76. According to the judgment of the case *Inuit Tapiriit*[18] the answer is *yes*. Why? Because this article 3.1 on its own, with no need for any other measure (national or from the EU), affects the legal situation of non-indigenous seal hunters since it does not allow them to commercialize in the EU internal market the seals they hunt.

A different example.

77. At the beginning of the Brexit process, before anything was yet agreed between the EU and the UK, a number of UK citizens expatriated in the EU were very concerned with what would happen with their right to work and reside in the EU after Brexit.

78. On 22 May 2017, at the very initial stage, the Council of the EU decided that the Commission should start negotiating with the UK the terms of an agreement of withdrawal of the UK.

79. At that moment, a number of UK citizens brought an annulment action against that decision of the Council allowing the Commission to start negotiations with the UK. Do you think that those UK citizens were directly concerned by this decision of the Council? The decision that the citizens wanted to challenge stated:

> ***Article 1***
>
> **The Commission is hereby authorised to open negotiations, on behalf of the Union, for an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union and from the European Atomic Energy Community, taking account of the framework for its future relationship with the Union, and is hereby nominated as the Union negotiator.**

80. In this case, the General Court considered that these citizens were *not directly concerned* by this decision of the Council. The action was rejected. This was stated in the case *Harry Schindler*[19].

81. Why did the General Court consider that these individuals were not directly concerned by this decision? Because the content of this decision of the Council did not *per se*, on its own, affect the rights of those individuals. This decision only authorized the Commission to start negotiating with the UK the terms of the future withdrawal but the decision established nothing that affected the rights of those UK citizens; it did not modify their legal situation. Perhaps as a result of the negotiation, those citizens could be affected in the future by the withdrawal agreement to be adopted, but the decision of the Council that was being contested at that moment did not cause an effect on them directly.

Individual concern

82. The CJEU understands that a legal act is of individual concern to a person when that legal act singles out (differentiates, treats especially) that person in relation to the rest of the addressees of the legal act due to certain attributes that are peculiar to that person. This is the criterion that the CJEU has followed since the case *Plaumann*[20].

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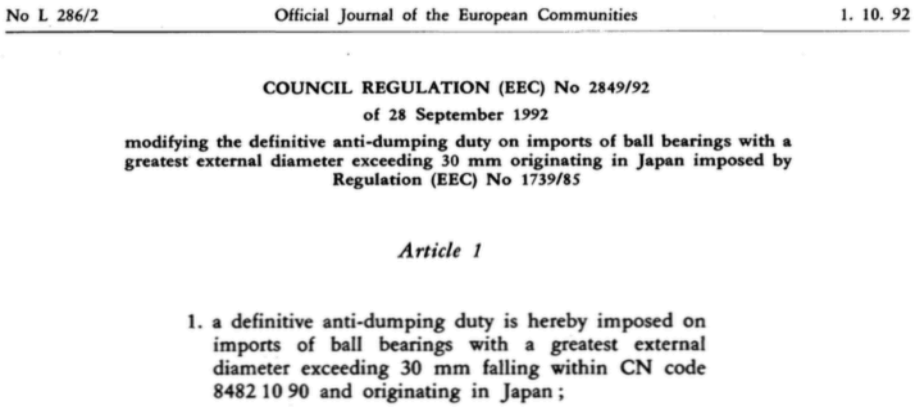
[18] Reference T-18/10.
[19] Reference T-458/17.
[20] Reference 25/62.

This is a very, very demanding requirement that non-privileged applicants can seldom satisfy.

83. For instance, if the Commission adopts a decision raising import duties of oranges, an importer of oranges would not be considered to be individually concerned in the decision unless the decision differentiates that importer from the rest of orange importers. This is precisely what happened in *Plaumann*[21]. The annulment action against the decision of the Commission was rejected because the decision did not single out Plaumann from the rest of the importers.

84. An example in which the CJEU did consider that a company was individually concerned in a legal act not addressed nominally to that company is the case *Nachi Europe*[22]. The CJEU considered that Nachi Europe was individually concerned in the content of Regulation 2849/92.

85. In its article 1.1, this regulation imposed an anti-dumping duty on ball-bearings[23] imported by Japanese companies into the European Communities. The anti-dumping duty is an extra charge that companies have to pay to import their goods into the EU because it is considered that they fix an extremely low price for those goods unfairly.



No L 286/2 Official Journal of the European Communities 1. 10. 92

COUNCIL REGULATION (EEC) No 2849/92
of 28 September 1992
modifying the definitive anti-dumping duty on imports of ball bearings with a greatest external diameter exceeding 30 mm originating in Japan imposed by Regulation (EEC) No 1739/85

Article 1

1. a definitive anti-dumping duty is hereby imposed on imports of ball bearings with a greatest external diameter exceeding 30 mm falling within CN code 8482 10 90 and originating in Japan;

86. As you can read, article 1.1 was addressed to Japanese importers of ball bearings in general, but for several reasons in article 1.2 the regulation singled out (treated differently) some Japanese importers. The list of singled-out companies included among others,

Inoue Jikuuke Kogyo Co Ltd, Osaka
(Taric additional code 8673),
Nachi Fujikoshi Corporation, Tokyo
(Taric additional code 8674),
Nippon Seiko Co Ltd, Tokyo
(Taric additional code 8673),
NTN Corporation, Osaka

[21] Reference 25/62.
[22] Reference C-239/99.
[23] *Rodamientos.*

87. The company Nachi Europe was not included in this list. Apparently, Nachi Europe was not singled out by this legal act. However, Nachi Europe had a very strong link with the Japanese company Nachi Fujikoshi Corporation of Tokyo because Nachi Europe was the company that Nachi Fujikoshi used in Europe to do business.

88. Because of this strong link between Nachi Fujikoshi and Nachi Europe, the CJEU considered that Nachi Europe was also singled out from the rest of the addressees of the legal act just as the other companies of the list of article 1.2 (Inoue Jikuuke Kogyo, Nippon Seiko, and NTN). The CJEU considered that Nachi Europe was individually concerned in this legal act, despite not being nominally listed. A situation like the one of Nachi Europe is not a normal situation. Generally, legal and natural persons not nominally addressed by a legal act cannot prove that they are individually concerned in that legal act.

89. Given this situation some applicants were tempted to start reasoning in the following way: "since our annulment action is not going to be accepted by the CJEU because it is very difficult to qualify as someone individually concerned, but we do really need to bring the annulment action, let us provoke a situation in which we are individually concerned by proceeding as follows: let us infringe the content of the legal act we want to contest and let us receive a sanction for doing it. That way we will be the nominal addressees of the sanction and we will then have the occasion to challenge the sanction and with that sanction, jointly, the legal act inspiring the sanction.

90. This circumstance was detected and it was decided to amend it. How? The Lisbon Treaty softened the requirements for non-privileged applicants willing to challenge regulatory acts. Please recall that regulatory acts are mainly delegated and implementing acts (Section II 2.2 of Lesson 5).

2.3.2.3 Against regulatory acts

91. Non-privileged applicants have legal standing to challenge a regulatory act if they are directly concerned with the regulatory act. They do not need to prove that they are individually concerned. This is clearly stated in article 263 TFEU:

> Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

92. What is explained above on direct concern applies here fully, but now specifically referring to regulatory acts. The CJEU interprets the concept of a regulatory act in the way we did in lessons 4 and 5: non-legislative acts, which today are fundamentally delegated and implementing acts.

93. An example of a case in which a company was deemed to be directly concerned in a regulatory act is that of the Pakistani bicycle company Kolachi Raj Industrial, case *Kolachi*[24].

[24] Reference T-435/15.

94. In this matter, an implementing regulation from the Commission extended a previously existing anti-dumping duty on Chinese bicycles to bicycles coming from Cambodia, The Philippines, and Pakistan. This implied that companies from these countries importing bicycles into the EU had to pay an extra charge because it was considered that they were selling their bicycles in the EU for a very low price that was unfairly reduced. This was established in the following regulatory act:

L 122/4 EN Official Journal of the European Union 19.5.2015

COMMISSION IMPLEMENTING REGULATION (EU) 2015/776

of 18 May 2015

extending the definitive anti-dumping duty imposed by Council Regulation (EU) No 502/2013 on imports of bicycles originating in the People's Republic of China to imports of bicycles consigned from Cambodia, Pakistan and the Philippines, whether declared as originating in Cambodia, Pakistan and the Philippines or not

1. The definitive anti-dumping duty applicable to 'all other companies' imposed by Article 1(2) of Regulation (EU) No 502/2013 on imports of bicycles and other cycles (including delivery tricycles, but excluding unicycles), not motorised, originating in the People's Republic of China, is hereby extended to imports of bicycles and other cycles (including delivery tricycles, but excluding unicycles), not motorised, consigned from Cambodia, Pakistan and the Philippines whether declared as originating in Cambodia, Pakistan and the Philippines or not, currently falling within CN codes ex 8712 00 30 and ex 8712 00 70 (TARIC codes 8712 00 30 20 and 8712 00 70 92) with the exception of those produced by the companies listed below:

95. The General Court considered that the company Kolachi had a direct concern in this implementing regulation. The regulation affected the rights of Kolachi because this company had to pay an anti-dumping duty in order to import bicycles into the EU. This impact of the regulation did not need further implementing acts and customs authorities had to apply it obligatorily at the border by collecting the anti-dumping duty.

Let us analyze now a matter in which the General Court considered that the applicant EU Copper Task Force had no direct concern: the case *EU Copper Task Force*[25].

The Commission issued the following legal act:

L 67/18 EN Official Journal of the European Union 12.3.2015

COMMISSION IMPLEMENTING REGULATION (EU) 2015/408

of 11 March 2015

on implementing Article 80(7) of Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market and establishing a list of candidates for substitution

[25] Reference T-310/15.

96. With this act the Commission included compounds of copper[26] in a list of plant protection chemical products[27] that are subject to a very restrictive regime of use and commercialization. This regime entailed that, after this implementing regulation was adopted, Member States had to authorize the marketing of copper compounds used for plant protection (for instance, pesticides) in its territory.

    Why did the General Court consider that the applicant Copper Task Force did not have a direct concern in this implementing regulation if the regulation imposed obligations to companies that were using copper to create pesticides?

97. Certainly, this implementing regulation restricted the use and marketing of copper pesticides very much. However, please notice that this implementing regulation could not on its own cause an impact in the sphere of the applicant because Member States had to authorize or deny the marketing of copper compound pesticides. The only measure that could *per se*, alone, on its own, affect the legal sphere of the applicant was a denial of marketing authorization of a Member State. Implementing regulation 2015/408 included copper in a list of products subject to restrictions but only a decision of Member States could allow or deny the marketing of copper pesticides.

    A conclusion can be reached:

98. You can appreciate that natural and legal persons have no problem raising an annulment action when the legal act to be contested is nominally addressed to them. In case that it is a regulatory act not addressed to them nominally, they can bring the annulment action if they are directly concerned. This is established so that they are not tempted to breach the regulatory act. In other cases (for instance, in case of wanting to react against a legislative act), it is very difficult that natural and legal persons can raise an annulment action because they need to prove that they are directly *and* individually concerned. This way the system assures that the CJEU is not overloaded with annulment actions coming from natural and legal persons across Europe.

    2.4 Grounds

99. Any infringement of EU law can justify an annulment action. The list of potential reasons that can ground an annulment action is very large. Article 263 TFEU refers to any "(…) infringement of the Treaties or of any rule of law relating to their application (…)." This is understood to refer to an infringement of any rule of EU primary or secondary law.

100. Additionally, article 263 TFEU expressly refers to certain specific types of infringements of EU law that justify an annulment action. These specific infringements can also be considered as "(…) any infringement of the Treaties or of any rule of law relating to their application (…)" but article 263 TFEU singles them out.

101. These infringements that article 263 TFEU singles out are: (i) lack of competence of the legal act, (ii) infringement of an essential procedural requirement, and (iii) misuse of powers.

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[26] *Compuestos químicos del elemento metálico cobre.*
[27] *Productos químicos que protegen plantas.*

2.5 Term

102. There is a period of time for raising the annulment action. The possibility of questioning a legal act does not remain open forever.

103. This period is of two months and starts counting from the moment in which the institution, the Member State, or the natural or legal person wanting to raise the annulment action knows of the content of the legal act it wants to contest.

104. If the legal act is published in the Official Journal of the EU, then it is considered that the institution or person wanting to raise the annulment action knows of the content of the legal act the day of its publication in this journal. Consequently, in these cases, the period of two months starts running the day of publication of the legal act.

105. If the legal act is not published in the Official Journal of the EU, then it is considered that the institution or person wanting to raise the annulment action knows of the content of the legal act the day it received a notification with the content of the legal act. In these cases, the period of two months starts running the day in which the institution or person wanting to raise the annulment action receives a notification with the content of the act.